



**U.S. Department of Justice**

Criminal Division

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Appellate Section

Washington, D.C. 20530

February 2, 2017

Honorable Catherine O'Hagan Wolfe  
Clerk of the Court  
U.S. Court of Appeals for the Second Circuit  
Thurgood Marshall United States Courthouse  
40 Foley Square  
New York, NY 10007

Re: *United States v. Anthony Allen & Anthony Conti*  
Docket Nos. 16-898(L) & 16-939(CON)

Dear Ms. Wolfe:

At argument in the above-referenced cases on January 26, 2017, the Court inquired about other LIBOR-related prosecutions in the United States and in the United Kingdom. The United States submits this letter to supplement the information provided at argument.

The Department of Justice has to date entered into criminal resolutions with six banks (Barclays, UBS AG, Royal Bank of Scotland, Rabobank, Lloyds Bank, and Deutsche Bank)<sup>1</sup> and has charged 13 individuals (including defendants Anthony Allen and Anthony Conti) with criminal conduct related to manipulation of the LIBOR. See *United States v. Tom Hayes, et al.*, 12-MJ-3229 (S.D.N.Y.); *United*

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<sup>1</sup> The resolutions reached with these banks are available electronically. See <https://www.justice.gov/iso/opa/resources/337201271017335469822.pdf> (Barclays deferred prosecution agreement); <https://www.justice.gov/iso/opa/resources/1392012121911745845757.pdf> (UBS); <https://www.justice.gov/iso/opa/resources/28201326133127414481.pdf> (Royal Bank of Scotland); [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/11/06/deferred\\_prosecution\\_agreement.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/11/06/deferred_prosecution_agreement.pdf) (Rabobank); [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/23/db\\_dpa.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/23/db_dpa.pdf) (Deutsche Bank); <https://www.justice.gov/opa/pr/lloyds-banking-group-admits-wrongdoing-libor-investigation-agrees-pay-86-million-criminal> (Lloyds Bank press release) (all webpages last visited January 31, 2017). The criminal information filed against Rabobank was dismissed after Rabobank complied with the terms of its deferred prosecution agreement. See *United States v. Coöperatieve Centrale Raiffeisen-Boerenleebank B.A.*, 3:13-CR-200-SWT (D. Conn. 2013).

*States v. Darrell Read, et al.*, 13-MJ-2224 (S.D.N.Y.); *United States v. Anthony Allen, et al.*, 14-CR-272-JSR (S.D.N.Y.); *United States v. Matthew Connolly, et al.*, 16-CR-370-CM (S.D.N.Y.). Two defendants (from Rabobank and UBS) are fugitives. See *United States v. Hayes*, 118 F. Supp. 3d 620, 629 (S.D.N.Y. 2015) (denying motion to dismiss by fugitive defendant Roger Darin). Six defendants (four from Rabobank and two from Deutsche Bank) have pleaded guilty. The United States dismissed charges against Tom Hayes (a trader from UBS) and three cash brokers after they were either convicted or acquitted on charges in the United Kingdom. Allen and Conti have thus far been the only defendants to proceed to trial in the United States. Two defendants (from Deutsche Bank) have pleaded not guilty, and proceedings against them remain pending. Additional investigations are ongoing.

The United Kingdom has to date charged 19 individuals with LIBOR-related crimes and is seeking to extradite four additional individuals for prosecution. One individual was convicted upon pleading guilty and four were convicted after trial. Six individuals were acquitted after trial. Cases against the others remain pending.

The Court also asked at argument about testimony by John Ewan as a Crown witness at a criminal trial in the United Kingdom that resulted in the conviction of Tom Hayes. As the district court noted (Special Appendix 9-10), defendants provided 32 pages of Ewan's testimony in connection with their initial motion for a Rule 15 deposition and subsequently provided hundreds of additional pages of Ewan's testimony with their motion for reconsideration. The government cited to those transcripts at argument (Argument Tr. 35-36 (citing Dkt. 106-3, at 8-9)) and in its response brief (Br. 103-06 (citing Dkt. 106-1, at 12-14, 24-28; Dkt. 106-3, at 8)), but the joint appendix contains only select portions. We therefore attach in full, for the Court's convenience, the transcripts submitted with defendants' reconsideration motion (Dkt. 106-1, 106-2, 106-3).

Finally, the Court asked the parties to make arrangements with the clerk's office to have a transcript of the oral argument prepared. It is our understanding that the clerk's office will make the transcript available to the Court but we nonetheless attach a copy here for the Court's convenience.

Respectfully submitted,

/s/John M. Pellettieri  
John M. Pellettieri

## CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I further certify that counsel for appellants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/John M. Pellettieri  
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**Attachment 1**  
**(Dkt. 106-1, 106-2, 106-3)**

# EXHIBIT 1

Excerpts from *R. v. Thomas Hayes*  
No: T20137308,  
Southwark Crown Court

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	<p>10 MR CHAWLA: My Lord, I call next, please, Mr John Ewan.      11 Page 196 in my Lord's bundle.      12 MR JOHN EWAN (sworn)      13 Examination-in-chief by MR CHAWLA      14 MR CHAWLA: Before I ask you anything at all, Mr Ewan, you      15 can see that this is a large courtroom and it's      16 important that everyone hears what you say. So could      17 you keep, please, your voice up and speak slower than      18 you might otherwise do.      19 A. I will try.      20 Q. Don't, please, be surprised if I stop you if you're      21 saying too much for us to take in one go.      22 A. Okay.      23 Q. Would you give us your full names, please.      24 A. My name is John McInnes Ewan.      25 Q. Mr Ewan, up until July --</p>
Page 85	<p>10 MR CHAWLA: I'm sorry, I'm just going to pause, my Lord.      11 (A note was received from the jury)      12 MR JUSTICE COOKE: I'll deal with this point later, if      13 I may, but the short answer is you get bundles that are      14 put in front of you and such bundles as the parties wish      15 to put in front of you. There may be further documents      16 still to come, but if they are only appearing on the      17 screen, then that's all that's happening for the moment.      18 What is being said, Mr Hawes, is that it will be      19 helpful with some of this material if the jury had it so      20 that they could make notes on.      21 MR HAWES: It would. There's quite a lot of it comes      22 into hard copy so your Lordship may want to deal with      23 how the jury will deal with the electronic evidence      24 because it will be available to them. It won't all be      25 put into hard copy for them. We can put certain      amounts.      26 MR JUSTICE COOKE: What is going to happen in relation to      27 the documents this morning upon which you have been      28 cross-examining?      29 MR HAWES: There will be an index and, as the Crown's      30 documents as well, the index -- we would anticipate all      31 the documents that have been shown to the jury would      32 there be referenced on that index and if there's any one      33 particular document, if it's not produced into hard</p>

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<p>1 documentation for the jury at the end, will be available 2 to them on the electronic system in the usual way. 3 MR JUSTICE COOKE: So they will have it on the electronic 4 system? 5 MR HAWES: Certainly, yes, and can call for it again. 6 MR CHAWLA: My Lord, our proposal -- I'm sorry if there's 7 a cross-purpose message here -- we had intended that 8 anything the jury had electronically they should be able 9 to have in hard copy as well, perhaps not immediately, 10 which doesn't solve the immediate problem of being able 11 to write on documents. 12 MR JUSTICE COOKE: No. 13 MR CHAWLA: But certainly it's impossible for anyone to 14 remember documents that they might have seen some weeks 15 earlier. 16 MR JUSTICE COOKE: Quite. 17 MR CHAWLA: If they haven't had a chance to go back to it in 18 hard copy form. So what we're proposing to do is to 19 create and keep updating a hard copy bundle so that it's 20 updated on a daily basis, as it were, so it's referable 21 to a particular witness and for the jury to have that. 22 What we hadn't yet decided, I have to say, is 23 exactly when the jury would get it. 24 MR JUSTICE COOKE: Yes. They're not in a position to make 25 electronic notes on the electronic documents as they</p>	<p>1 subject of counsel's submissions to you but I shall sum 2 up what the themes are as they have emerged to remind 3 you of the relevant themes of evidence. Thank you for 4 that. It's a very valid point. We appreciate the 5 difficulties. 6 MR CHAWLA: Mr Ewan, were you formally employed by the 7 British Bankers Association, the BBA? 8 <b>A. I was.</b> 9 Q. Was that until July of 2012? 10 <b>A. Yes.</b> 11 Q. At that point did you leave in order to join an 12 organisation we have heard of, Thomson Reuters? 13 <b>A. That's correct.</b> 14 Q. Is that where you're currently working? 15 <b>A. Yes.</b> 16 Q. Now, as far as the scope of your evidence at the moment 17 is concerned, I'm going to be focusing on events between 18 approximately 2006 and 2010, but we need to deal with 19 one or two matters for context prior to that; all right? 20 <b>A. Yes.</b> 21 Q. Now, first of all, when did you join the BBA? 22 <b>A. I believe it was May 2005.</b> 23 Q. You have, I think to your right, a copy of your 24 statements that you prepared or a number of statements 25 that you prepared and signed as part of this</p>
<p style="text-align: center;">Page 89</p>	<p style="text-align: center;">Page 91</p>

<p>1 come up. 2 MR CHAWLA: No. 3 MR JUSTICE COOKE: So all they can do is make a paper note 4 of a date of a document and something that was said 5 about it and then when later they receive the physical 6 hard copy, they could then transfer such notes to the 7 document in question, but that's not really very 8 satisfactory. 9 MR CHAWLA: My Lord, until we find a system to enable jurors 10 to mark on screen -- 11 MR JUSTICE COOKE: That is coming, but it's not available as 12 yet. 13 MR CHAWLA: I know. 14 MR JUSTICE COOKE: I have suffered from the same problems 15 you have this morning. I have had some of these 16 documents and been able to find one or two of them but 17 not all and I have been doing what you have been doing, 18 namely making notes in my notebook and then I'll have to 19 check up on them in due course. 20 MR CHAWLA: We'll try and find the most efficient way of 21 doing it but trying at the same time not to overburden 22 the jury with other documents. 23 MR JUSTICE COOKE: Indeed. Some of the detail of the 24 document is less important than the overall message that 25 is coming through, which will in the end not only be the</p>	<p>1 investigation, did you not? 2 <b>A. Correct.</b> 3 Q. You refer to a large number of documents and details in 4 there. Would it assist you to have that available to 5 you in order to refresh your memory of the events? 6 <b>A. I have been provided with a copy of my statement.</b> 7 Q. But just going back to my question: would it help you to 8 be able to refer to it? 9 <b>A. Yes.</b> 10 MR CHAWLA: My Lord -- 11 MR JUSTICE COOKE: Provided there's no objection -- 12 MR HAWES: No. 13 MR JUSTICE COOKE: Certainly. 14 MR CHAWLA: I'm going to take your own role, at least in 15 overall terms, very briefly at the moment, although 16 we'll have to look at aspects of it shortly. 17 Prior to 2005, when you joined the BBA, what was 18 your experience in the financial world? 19 <b>A. I had worked in a call centre for an investment manager</b> 20 <b>for a year and then I had worked for FTSE, which is a --</b> 21 Q. Just tell us what FTSE means? 22 <b>A. Well, it stands for Financial Times Stock Exchange which</b> 23 <b>were the two companies that at the time owned FTSE and</b> 24 <b>it's probably best known for calculating stock market</b> 25 <b>indices.</b></p>
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<p>1 Q. What role did you have at FTSE?</p> <p>2 <b>A. I was employed initially to do reviews of the constituents of the stock market indices and then that role moved more to acting as the secretary for the various independent committees that oversaw the operation of families of indices.</b></p> <p>7 Q. How long were you in that role for?</p> <p>8 <b>A. I believe it was 1998 to 2003.</b></p> <p>9 Q. Then were you in fact abroad between 2003 and 2005?</p> <p>10 <b>A. Yes. I resigned and went travelling for a little over a year.</b></p> <p>12 Q. Then coming back to England and starting work in about May 2005 at the BBA?</p> <p>14 <b>A. Correct.</b></p> <p>15 Q. What was your role there at that time?</p> <p>16 <b>A. I was LIBOR manager.</b></p> <p>17 Q. What did that mean?</p> <p>18 <b>A. It meant looking after the day-to-day business of the LIBOR benchmark and acting as the secretary to the Foreign Exchange and Money Markets Committee which is the group that was responsible for the operation of the LIBOR benchmark.</b></p> <p>23 Q. So your title at that time was LIBOR Manager?</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. Did that title change?</p>	<p>1 help us a little bit about Mr Merriman. You have told us that you reported initially to him?</p> <p>3 <b>A. Correct.</b></p> <p>4 Q. So what was his title and role? My Lord, I'm looking at paragraph 13.</p> <p>6 <b>A. I believe when I joined his job title was director and he was at the time that I joined responsible directly for the day-to-day operation of LIBOR and, in addition to that, he had a role where he worked on the BBA's lobbying and policy operations.</b></p> <p>11 Q. Now, in the early days of your employment, how hard or easy was your work?</p> <p>13 <b>A. Well, whenever you join a new company there's a lot to learn so I had a background knowledge about financial markets in general and I knew a bit about financial benchmarks and I knew quite a lot about how you manage the working rhythm of a committee that looks after benchmarks, but I had to learn a lot about LIBOR and the specifics of that one benchmark, how it operated. So, I mean, there was a lot to learn but it wasn't particularly difficult or stressful because it was a period when the financial markets were in a very benign state.</b></p> <p>24 MR CHAWLA: I'm going to come next -- and I suspect, my Lord, it may be better to do it after the short</p>
<p style="text-align: center;">Page 93</p> <p>1 <b>A. Yes. I was given the title of LIBOR Director in about 2007 and this was due to the way that job descriptions worked in the BBA. It doesn't mean director in the formal sense of being a company director. It was just the way that you progressed through. And then in 2010, when the BBA incorporated LIBOR as its own company within the BBA group, I became the managing director of BBA LIBOR Ltd. That's the title that I held until I resigned.</b></p> <p>10 Q. Up until that time, in 2010, did your role, regardless of title, actually change, so between 2005 and then we have the title in 2007 and then another title in 2010?</p> <p>13 <b>A. No. My role didn't change. My position in the company perhaps changed because rather than reporting to an immediate superior called Alex Merriman, who left, I started reporting to the deputy chief executive and the chief executive of the BBA.</b></p> <p>18 Q. We have heard that they were respectively Mrs Scutt and Mrs Knight?</p> <p>20 <b>A. Correct.</b></p> <p>21 Q. We have heard something about the BBA and I'm not going to invite you to repeat that which we have heard and which is not controversial. We know something about some of those individuals, including Mrs Knight, now obviously Mrs Scutt. You mentioned Mr Merriman. Just</p>	<p style="text-align: center;">Page 95</p> <p>1 adjournment -- to 2007 onwards as an overview.</p> <p>2 MR JUSTICE COOKE: Yes. All right. 2 o'clock, please,</p> <p>3 members of the jury. Thank you.</p> <p>4 (In the absence of the jury)</p> <p>5 MR JUSTICE COOKE: Mr Ewan, I think you're going to be here</p> <p>6 for some time but the basic rule is that during</p> <p>7 adjournments you don't talk to anybody at all about your</p> <p>8 evidence, any break at all, once you're in the witness</p> <p>9 box.</p> <p>10 <b>A. Thank you. That has been explained to me.</b></p> <p>11 MR JUSTICE COOKE: You can talk about anything else, but not</p> <p>12 about the case. Thank you.</p> <p>13 (1.05 pm)</p> <p>14 (Luncheon Adjournment)</p> <p>15 (2.00 pm)</p> <p>16 MR JUSTICE COOKE: Can I just raise one thing before the</p> <p>17 jury come in. I have an e-mail here from</p> <p>18 Professor Cooper who would like to attend on Monday or</p> <p>19 Tuesday, about which of course there's no problem, but</p> <p>20 in real terms it will obviously be better from her</p> <p>21 perspective if she was able to sit in front of the dock</p> <p>22 and that really depends on either prosecution or defence</p> <p>23 being happy to have her sit in the area.</p> <p>24 MR HAWES: We would be very content for her to sit.</p> <p>25 MR JUSTICE COOKE: Wherever.</p>

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<p>1 MR HAWES: She has been very assistful to us, as I indicated 2 to your Lordship, so no difficulty at all.</p> <p>3 MR JUSTICE COOKE: So I can tell her she can come and who 4 shall I tell her to make contact with?</p> <p>5 MR HAWES: Mr Convey.</p> <p>6 MR JUSTICE COOKE: Very good.</p> <p>7 MR HAWES: Thank you.</p> <p>8 (In the presence of the jury)</p> <p>9 MR CHAWLA: Mr Ewan, you told us about the first year or so, 10 learning about the job, learning about LIBOR and other 11 things. We know during the period of your employment at 12 the BBA of the credit crisis coming in in 2007 and 13 reaching its peak in 2008. 14 What was the nature of your job? How easy or 15 difficult was it at that stage?</p> <p>16 <b>A. It became significantly more challenging because LIBOR is the benchmark that indicates stress in the credit markets and so there was a lot of interest in the benchmark. Where before it had been a very minor cog in the global financial markets, it now became used very widely as an indicator of stress and, as such, it became of great interest to the media and the financial markets worldwide.</b></p> <p>17 Q. What impact did that have on you?</p> <p>18 <b>A. Well, it meant that there was considerably more work to</b></p>	<p>1 Q. You were also responsible for organising the LIBOR 2 website and any LIBOR-related events, whether 3 conferences, conventions and the like?</p> <p>4 <b>A. Yes, or meetings with participants and other interested parties.</b></p> <p>5 Q. In addition to that, did you also conduct annual 6 relationship visits with banks, primarily LIBOR panel 7 banks?</p> <p>8 <b>A. Yes.</b></p> <p>9 Q. For the first couple of years of your employment, were 10 those led by your more senior colleague, Mr Merriman?</p> <p>11 <b>A. Yes.</b></p> <p>12 Q. And thereafter did you lead the meetings yourself, 13 assisted by other members of the BBA?</p> <p>14 <b>A. Yes.</b></p> <p>15 Q. We'll look at one or two aspects of those meetings in 16 due course, but before we do just still with an overview 17 of your role. Was an important part of your role acting 18 as the -- we have heard it described as the secretariat 19 for the FXMMC?</p> <p>20 <b>A. Yes.</b></p> <p>21 Q. In terms of the FXMMC, was that a decision-making body 22 which oversaw the panel banks as contributors to or of 23 the rates for LIBOR?</p> <p>24 <b>A. Yes.</b></p>
<p>1 <b>do, not necessarily in the actual production but because we at the BBA at the time were fielding a lot of requests and interests from all participants in the financial markets and from the media and we had to deal with these and a lot of this interest was in suggestions that the rate was either too high or too low, depending on who was asking the questions. So we had to put a lot of effort into our own internal work to ensure that the rate is accurate and also to try to ensure that we dealt with all of the enquiries, comments, queries that were coming in all the time.</b></p> <p>2 Q. We'll look at some of those shortly, but can I just 3 deal, first of all, with aspects of your role itself so 4 that we can put all of that into context. 5 My Lord, I'm picking it up at paragraph 17. As 6 LIBOR manager, as the BBA LIBOR manager, your role, was 7 it not, was to oversee and deal with all day-to-day 8 matters relating to LIBOR?</p> <p>9 <b>A. Yes.</b></p> <p>10 Q. That involved on a daily basis organising the licensing 11 arrangements, responding to queries in relation to the 12 rate, dealing with press releases, to be approved by the 13 chief executive officer, Mrs Knight, or the press team, 14 and on occasion yourself speaking to the media?</p> <p>15 <b>A. Yes.</b></p>	<p>1 Q. Was it separate from the BBA?</p> <p>2 <b>A. Yes, it was. It was held at the BBA premises and I was the secretary and so I or people who worked with me would write the minutes, but the BBA had no seat or vote at any time and it was made up of individuals, largely representatives of LIBOR rate-setting banks.</b></p> <p>3 Q. Was it designed to provide practitioner advice on money 4 market issues and LIBOR?</p> <p>5 <b>A. Yes.</b></p> <p>6 Q. Did its main role involve the oversight of the 7 membership of the submitter panels?</p> <p>8 <b>A. During my time at the BBA, yes, and, as we move through 2007 and 2008 and 2009, attempting to formulate a response to the credit crisis to make sure that the rate remained accurate.</b></p> <p>9 Q. In addition, did it deal with any issues of governance, 10 scrutiny and surveillance of LIBOR generally?</p> <p>11 <b>A. It was the ultimate body that was responsible for that, yes.</b></p> <p>12 Q. Was the BBA as an organisation empowered to, as it were, 13 overrule or challenge or alter any decisions of the 14 FXMMC?</p> <p>15 <b>A. Absolutely not.</b></p> <p>16 Q. As far as the FXMMC was concerned, did you have or did 17 it have, I should say, approximately, depending on</p>

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<p>1 precisely when, 15 members sitting on the committee?</p> <p>2 <b>A. That's correct.</b></p> <p>3 Q. And were they individuals from panel banks?</p> <p>4 <b>A. In large part, yes.</b></p> <p>5 Q. Were they representatives of the banks or were they</p> <p>6 there in an individual capacity?</p> <p>7 <b>A. They were there in their capacity as individual experts.</b></p> <p>8 Q. Just by way of example, without looking at the detail of</p> <p>9 this document, can we have on screen, please, JME/0001.</p> <p>10 Go to the next page of that, please, because there we</p> <p>11 have what is called an advisory panel of the FXMMC; yes?</p> <p>12 <b>A. Yes.</b></p> <p>13 Q. Is that in fact the FXMMC?</p> <p>14 <b>A. Yes, it is.</b></p> <p>15 Q. You can see, and we'll just look at the names, in</p> <p>16 attendance there are 11, including yourself and</p> <p>17 Mr Denton of the BBA?</p> <p>18 <b>A. Yes.</b></p> <p>19 Q. The others we can see, we have a representative from</p> <p>20 Bank of America or an individual, I should say, from the</p> <p>21 Bank of America, JP Morgan, HBOS, Abbey National, the</p> <p>22 Royal Bank of Scotland, Citibank, the Bank of</p> <p>23 Tokyo-Mitsubishi, HSBC and UBS?</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. Were there others at that time, can you remember -- it</p>	<p>1 employment, 2005/2006, did the committee meet annually?</p> <p>2 <b>A. That's correct.</b></p> <p>3 Q. Once the financial crisis struck, did that become more</p> <p>4 often?</p> <p>5 <b>A. It did.</b></p> <p>6 Q. To what sort of number?</p> <p>7 <b>A. Well, there were a number of ad hoc committees that were</b></p> <p>8 <b>called between I think the first one was in 2007 and</b></p> <p>9 <b>I think after 2008 the committee moved to a quarterly</b></p> <p>10 <b>basis, but, again, as necessary with ad hoc meetings to</b></p> <p>11 <b>discuss an issue that might have come up.</b></p> <p>12 Q. In very broad terms, and just in a sentence or so, what</p> <p>13 sort of issues were coming up during the financial</p> <p>14 crisis?</p> <p>15 <b>A. Mainly did the definition of LIBOR mean that we could</b></p> <p>16 <b>still set an accurate rate through this remarkable</b></p> <p>17 <b>turmoil in the market.</b></p> <p>18 Q. It's easy now, 2015, to think back to 2007 but how</p> <p>19 difficult was that time for someone who was going</p> <p>20 through it as a member of the BBA?</p> <p>21 <b>A. Well, it was extremely difficult because the financial</b></p> <p>22 <b>crisis, the credit crisis in 2007 and 2008 was the most</b></p> <p>23 <b>severe crisis in the credit market for a very, very long</b></p> <p>24 <b>time and nobody who was working in any financial market</b></p> <p>25 <b>or the BBA had experienced this in their careers before</b></p>
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<p>1   <b>A. Yes.</b></p> <p>2   Q. "In general BBA LIBOR is a healthy, well used product,</p> <p>3   although BBA euro LIBOR has lost ground to EURIBOR."</p> <p>4   Let's not worry too much about that. We know that</p> <p>5   there are different benchmarks around the world.</p> <p>6    "Nobody we have visited has any bright ideas on how</p> <p>7   to fix this as banks on the continent will generally</p> <p>8   choose their local fix."</p> <p>9    Then this:</p> <p>10    "There is consensus amongst banks that sterling</p> <p>11   LIBOR and US dollar are being set 3 to 4 basis points</p> <p>12   above the true cash rate. There is a definite split in</p> <p>13   how this is viewed. Those banks whose main business is</p> <p>14   in derivatives or loans are perfectly happy with this,</p> <p>15   as it is to their advantage. Those more active in the</p> <p>16   cash market regard this as a problem that must be</p> <p>17   addressed. The third and easily the largest group</p> <p>18   recognises the fact but see it as a construct of the</p> <p>19   market and are unconcerned about it."</p> <p>20    What does "construct of the market" mean in this</p> <p>21   context?</p> <p>22   <b>A. It's the way things are.</b></p> <p>23   Q. All right. Then there's talk about disaster recovery</p> <p>24   scenarios. Presumably that's if somebody loses lots of</p> <p>25   panel banks as members?</p>	<p>1   process has worked over the last year. Does anything</p> <p>2   need fixing?</p> <p>3    "2. Any view of the quality of market fixings,</p> <p>4   generally and specifically.</p> <p>5    "3. Any other observations on BBA LIBOR."</p> <p>6    Then that's split into:</p> <p>7    "Can the definition be improved. Any precise</p> <p>8   descriptions of just before 11.00 am or reasonable</p> <p>9   marketable size [written there] possible. Is it</p> <p>10   desirable to have precise definitions? Is the new basis</p> <p>11   for reporting market activity an improvement both in</p> <p>12   terms of the reporting period and what transactions</p> <p>13   should be included?"</p> <p>14    Number 4:</p> <p>15    "What other issues should be discussed by the FXMMC</p> <p>16   in the near future?"</p> <p>17    5:</p> <p>18    "Does your bank have business continuity procedures</p> <p>19   in place to ensure that their contribution into the BBA</p> <p>20   LIBOR rate setting process is not interrupted?"</p> <p>21    That's what you were just referring to, the disaster</p> <p>22   recovery.</p> <p>23    6:</p> <p>24    "Are there any new data products you would like to</p> <p>25   see the BBA introduce?"</p>
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<p>1   <b>A. I think that's more a reference to what happens if there</b></p> <p>2   is a failure of the banks to get the data to</p> <p>3   Thomson Reuters to do the calculation.</p> <p>4   Q. Then we have:</p> <p>5    "The ambiguity in the current LIBOR definition,</p> <p>6   concentrating on the words 'in reasonable market size</p> <p>7   just prior to 11.00' should be retained ..."</p> <p>8    The reasons for that are given.</p> <p>9    The next bullet point, and you understand I'm not</p> <p>10   taking every word of these but just to get flavour of</p> <p>11   them:</p> <p>12    "There is a split on the matter of the BBA</p> <p>13   introducing further LIBOR currency calculations.</p> <p>14    "There is no appetite for any other brand new</p> <p>15   products from the BBA."</p> <p>16   Finally, a reference to euro LIBOR and EURIBOR and,</p> <p>17   as I say, apart from seeing the reference, I don't think</p> <p>18   we are going to be assisted by analysing that.</p> <p>19   Can we go to the last page of this document, so we</p> <p>20   can see how it works, page 10. Was the situation this,</p> <p>21   Mr Ewan, that the individuals that you spoke to at the</p> <p>22   banks were asked generally to address these six issues?</p> <p>23   <b>A. That's correct.</b></p> <p>24   Q. So the first one is:</p> <p>25    "General impressions on how the BBA LIBOR panel</p>	<p>1   That, again, is spelt out in a little detail; yes?</p> <p>2   So with those questions in mind, I'm not going to go</p> <p>3   through every one of these, please, by any stretch of</p> <p>4   the imagination but can we go back to page 2. Do we</p> <p>5   then have listed in the following pages on this and the</p> <p>6   following pages a note of your meeting with the</p> <p>7   individual or individuals from the particular banks, so</p> <p>8   we have -- can we put the whole page up. I'm sorry if</p> <p>9   it might be a little small. The next page.</p> <p>10   We have there Bank of America, Credit Suisse First</p> <p>11   Boston. Just pausing there, please, just so we can</p> <p>12   follow it for a moment. Up a little bit more so we have</p> <p>13   the whole page. You have who the attendee is from the</p> <p>14   bank, what their particular role is within the bank, the</p> <p>15   date. Does that refer to the date of the meeting with</p> <p>16   that individual?</p> <p>17   <b>A. I believe so.</b></p> <p>18   Q. Then contributors to, and is that the currency to which</p> <p>19   they're a panel bank?</p> <p>20   <b>A. Correct.</b></p> <p>21   Q. Then under that, at 1 through to 6, are those the</p> <p>22   answers to the issues that were addressed in that</p> <p>23   appendix?</p> <p>24   <b>A. Yes.</b></p> <p>25   Q. So, for example, if you go down to -- can we blow up the</p>
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<p>1 bottom of that page, please -- Credit Suisse in Swiss  2 francs, euros and US dollars. The two people there  3 observed at number 2:</p> <p>4 "The sterling and US dollar LIBOR are set 3 to 4  5 basis points too high each day. This is a major problem  6 and must be fixed. They submit their true rates each  7 day and believe that most days they're knocked out of  8 the rate setting process in the topping and tailing  9 process ..."</p> <p>10 That's the trimming process, is it not?</p> <p>11 <b>A. Yes.</b></p> <p>12 Q. "... as many other banks are contributing inflated  13 rates."</p> <p>14 So that's one comment. In fact there are  15 a number of different comments.</p> <p>16 If we take another one, for example, at page 4,  17 JP Morgan Chase:</p> <p>18 "(i) the BBA LIBOR fixing process works well."</p> <p>19 We can see, just in passing, that they are  20 a contributor to nine of the ten currencies for LIBOR?</p> <p>21 <b>A. Yes.</b></p> <p>22 Q. So they say:</p> <p>23 "The fixing process works well. Note that pounds  24 and dollar LIBOR are higher than the true position but  25 everyone in the market knows this and prices</p>	<p>1 will quote rates to suit their current position. It has  2 always been the way."</p> <p>3 Now, during your period, and certainly -- we'll look  4 very briefly at 2006, but would you get complaints that  5 other banks are doing something wrong?</p> <p>6 <b>A. At this time, in 2005, I do not recall that.</b></p> <p>7 Q. All right. In any event, we know that this is very  8 early on. I think you have been there about a month at  9 this stage?</p> <p>10 <b>A. Yes.</b></p> <p>11 Q. These meetings are at June of 2005 and you joined  12 in May. It may well be, is this the position, that the  13 detail of this perhaps was not something that you were  14 intimately familiar with at this point?</p> <p>15 <b>A. That's right. I was just taking notes on what people  16 said to me.</b></p> <p>17 Q. Okay. The next year there was a similar review, was  18 there not?</p> <p>19 <b>A. Yes.</b></p> <p>20 Q. Can we have on screen, please, JME/0003. We start in  21 fact at page 15 of this document, the last page,  22 because, again, we have within an appendix the agenda  23 which are the questions of issues that are there raised;  24 yes?</p> <p>25 <b>A. Yes.</b></p>
<p style="text-align: center;">Page 109</p>	<p style="text-align: center;">Page 111</p>

  

<p>1 accordingly. Don't want the BBA to attempt to 'correct'  2 this."</p> <p>3 There are other comments such as that; yes?</p> <p>4 <b>A. Yes.</b></p> <p>5 Q. Then you have, over the page -- and I'm just going to  6 pick up a couple of comments, if we may -- BOTM:</p> <p>7 "The fixing process works well. The change of  8 definition has made the information that has to be  9 submitted to the review harder to gather but this is not  10 a problem."</p> <p>11 Third, he observed that:</p> <p>12 "Sometimes BBA LIBOR quotes are high because they're  13 set by the treasury function within a bank that then  14 goes on to use the LIBOR rate internally in the bank.  15 In these cases the treasury department can make extra  16 profit by charging other departments in the bank itself  17 at that artificial rate."</p> <p>18 If you're going to make money, you're going to make  19 money, aren't you? Sorry, that was a flippant comment.</p> <p>20 In any event, that's what it says?</p> <p>21 <b>A. It is.</b></p> <p>22 Q. Then, finally, in the context of this, just as again an  23 example, HBOS, at the bottom of that page:</p> <p>24 "The fixing process works well as the market  25 standard. BBA LIBOR is well understood. Some companies</p>	<p>1 Q. So, first of all:  2 "General impressions on how the LIBOR panel process  3 has worked over the last year. Does anything need  4 fixing?"</p> <p>5 Secondly:  6 "Any view of the quality of market fixings,  7 generally and specifically."</p> <p>8 Third:  9 "Any other observations? Can the definition be  10 improved?"</p> <p>11 Fourth, this is a new question from the previous  12 year:  13 "Will the Bank of England's money market reforms  14 have an effect on sterling rates?"</p> <p>15 "5. What other issues should be discussed by the  16 FXMMC?"</p> <p>17 "6. Does your bank have business continuity  18 procedures?"</p> <p>19 "7. What currencies should we consider introducing  20 BBA LIBOR calculation."</p> <p>21 Then a further point about that.</p> <p>22 8:  23 "Are there any data products you would like to see  24 the BBA introduce or are there others with more or  25 greater potential?"</p>
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<p>1 Again, is the process similar going across to 2 different banks and in fact other organisations?</p> <p>3 <b>A. Yes.</b></p> <p>4 Q. So we have -- and, again, I'm only going to look at 5 examples, please. Back to page 1. BNP Paribas who 6 submitted in sterling. General comments include, at the 7 third bullet point:</p> <p>8 "They are very happy with the LIBOR rate setting and 9 regard it as very useful, very high quality tool and the 10 representative there said it was the most important 11 fixing in the world."</p> <p>12 Citigroup, bottom of that page, we have there 13 a Mr Gray and a Mr Thursfield. They submitted in five 14 currencies, including yen:</p> <p>15 "The BBA LIBOR fixing process is stable and 16 efficient. The rates are accurate and what is more 17 consistent. The JPY rate is getting more accurate."</p> <p>18 Can you help us now at all about what that means? 19 I appreciate I am asking you events nine years ago now.</p> <p>20 <b>A. I don't know.</b></p> <p>21 Q. Very well. Thirdly:</p> <p>22 "It's not broken, don't try to fix it."</p> <p>23 It continues.</p> <p>24 The next bank, over the page, the National Australia 25 Bank, Australian dollars and New Zealand dollars:</p>	<p>1 market which gives them a different perspective to other 2 banks. Bank of America sets its rates 4 basis points 3 above where they could raise funds which is the return 4 they need."</p> <p>5 So that's a slightly different message on this one; 6 yes?</p> <p>7 <b>A. Yes.</b></p> <p>8 Q. Can you remember anything about that now, so talking 9 about generating their LIBOR rates off the derivatives 10 market?</p> <p>11 <b>A. Well, I don't recall the specifics. There are 12 a number of things that that could mean, but I don't 13 know -- I couldn't say at nine years removed what 14 exactly Dan Knight meant.</b></p> <p>15 Q. Do you remember whether that caused you any concern at 16 that particular point?</p> <p>17 <b>A. I think at that point, no, not really, because I was at 18 that point still the junior person and these were -- 19 this was information that I was gathering, then giving 20 to my managers and then ultimately on to the committee 21 whose job it is to look at these comments and decide how 22 to act.</b></p> <p>23 Q. So where were these notes going?</p> <p>24 <b>A. They were going to the Foreign Exchange and Money 25 Markets Committee.</b></p>
<p style="text-align: center;">Page 113</p> <p>1 "Fixings are good. There used to be some dodgy BBA 2 LIBORs but they're now reliable."</p> <p>3 At the bottom of the page, JP Morgan Chase, still 4 contributing to nine currencies:</p> <p>5 "The BBA LIBOR fixing process works well."</p> <p>6 Then at 2:</p> <p>7 "When the Bank of Japan changed its outlook on 8 interest rates in early May there was instability in the 9 yen rates for a few days but this has settled down."</p> <p>10 Then it concludes:</p> <p>11 "The definition of BBA LIBOR is just fine as it is."</p> <p>12 Can we go over to page 4 because the message isn't 13 the same across every person you speak to, is it?</p> <p>14 <b>A. No.</b></p> <p>15 Q. So here we have at the Bank of America a Mr Knight. 16 They contribute to four currencies, including yen LIBOR: 17 "The impressions on BBA LIBOR panel process, does 18 anything need fixing?" which was the first issue.</p> <p>19 Answer:</p> <p>20 "It's fine."</p> <p>21 Second, the view of the quality of market fixings:</p> <p>22 "The rate setting process is currently efficient. 23 Bank of America is often dropped from the US dollar 24 fixings at one month and three month but this is because 25 they generate their LIBOR rates off the derivatives</p>	<p style="text-align: center;">Page 115</p> <p>1 Q. Then, please, can we go on to the next page. There's 2 reference at the top to Deutsche Bank and the comments 3 that the BBA LIBOR panel process itself is okay. I'm 4 going to pass over LIBOR and EURIBOR. Then Mr Nicholls 5 is recorded as having said something to this effect:</p> <p>6 "Sees the market as more volatile in the last year 7 than previously but unsecured bank funding rates are 8 nevertheless closing to BBA LIBOR rates. The rate 9 setting process is okay and no banks try to skew it. 10 Need to watch the yen rates as Bank of Japan 11 announcements are having profound effects at the 12 moment."</p> <p>13 Finally:</p> <p>14 "BBA LIBOR setting doesn't always react fast enough 15 to events in the market, for example Fed ..."</p> <p>16 The American Federal Bank, is that?</p> <p>17 <b>A. The Federal Reserve system.</b></p> <p>18 Q. "... rate changes. Deutsche create their BBA LIBOR 19 rates referencing the derivatives market as cash isn't 20 liquid or transparent enough."</p> <p>21 Then talking about capability and the like.</p> <p>22 Again, can you remember what that is a reference to?</p> <p>23 <b>A. Well, there is a little more context around that. As 24 I imagine we will discuss at length, as we move through 25 time towards 2007 and 2008 the cash markets dry up</b></p>

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<p>1     <b>entirely. I mean, this effect is seen in 2005 and 2006</b>  2     <b>because the cash markets have been shrinking for many</b>  3     <b>years and so I think what Deutsche Bank are saying is if</b>  4     <b>they are not able to set a LIBOR with direct reference</b>  5     <b>purely to cash that they're borrowing because there's</b>  6     <b>not cash being borrowed and lent, they have to use</b>  7     <b>another means of setting their LIBOR rates and there are</b>  8     <b>markets in derivatives that are like the cash markets,</b>  9     <b>not exactly the same but similar, and you can use those</b>  10    <b>as a tool to help you set your LIBOR.</b></p> <p>11   Q. Was that of any particular concern to you, can you  12   remember?</p> <p>13   A. <b>I don't recall it being of any great concern.</b></p> <p>14   Q. Did that theme, so, for example, where there's no cash  15   or very little cash actually being traded and people  16   using other reference points, did that come up as  17   a theme in due course as well?</p> <p>18   A. <b>That will become a central theme.</b></p> <p>19   Q. We'll come to that in due course then. Then, finally --  20   not quite finally, but just in the context of this  21   document, let's move down the page to HSBC. Now, this  22   is Mr Wood and we've seen reference to him already,  23   either as Jonathan Wood or Jon Wood. He starts by  24   saying, first of all, how the process worked. It's  25   fine. Secondly:</p>	<p>1     <b>explanation of that.</b></p> <p>2   Q. I don't think we're going to be assisted by that so  3   we'll move on in any event.</p> <p>4       That was earlier in the year when that is being  5   spoken of, earlier in 2006.</p> <p>6       Jumping ahead please, to page 9. At the bottom of  7   that page, we can see it wasn't just panel banks who  8   were being consulted but there is an inter-dealer  9   broker. [REDACTED] yes?</p> <p>10   A. Yes.</p> <p>11   Q. They are being asked about his views. He says all his  12   brokers are happy with the quality of the fixings:</p> <p>13       "Currently circumstances are good. There's healthy  14   volatility in the market. Not too little, not too much.  15   This is however from a broker perspective. A trader  16   would find the markets too quiet. Not enough  17   opportunities for making money."</p> <p>18       So you are getting a different perspective on it as  19   well?</p> <p>20   A. Yes.</p> <p>21   Q. We see that as well if we go to page 11. We almost see  22   that because if you go to the middle of that page, we  23   see a reference to [REDACTED] a date and absolutely nothing  24   below that. So quite what they said is not clear,  25   certainly not recorded here?</p>
<p style="text-align: center;">Page 117</p>	<p style="text-align: center;">Page 119</p>

<p>1       "2005/2006 has been a more normal stable year in the  2   markets. There was a problem earlier in the year with  3   negative yen interest rates but this has resolved."</p> <p>4       Then he's talking about sterling and dollar being  5   set 3 to 4 basis point, presumably, is it?</p> <p>6   A. Yes.</p> <p>7   Q. Above the actual cash rate each day but euro LIBOR is  8   representative. This time they estimated that euro was  9   1 basis point over the offer side, et cetera. He's  10   saying that this is indicative of tightening spreads in  11   all currencies.</p> <p>12   "Any other observations", he says:  13   "It isn't broken, don't attempt to fix."</p> <p>14   Just because it's not something that we may be  15   familiar with -- I don't know if you are -- a negative  16   interest rate, do you know what that means? If not, say  17   so.</p> <p>18   A. <b>Well, a negative interest rate is if you would --</b>  19   <b>normally interest rates are -- you would borrow money</b>  20   <b>and you would then pay it back and you would pay an</b>  21   <b>interest rate for the benefit of having borrowed that</b>  22   <b>money, but under certain very strange circumstances you</b>  23   <b>can see it the other way around.</b></p> <p>24   Q. We don't need to worry too much about that.</p> <p>25   A. <b>You would need to get an economist to give you a full</b></p>	<p>1     <b>A. Well, that's correct, yes.</b></p> <p>2   Q. All right. So did those meetings continue into the  3   succeeding years?</p> <p>4   A. <b>I believe they happened every year I was at the BBA.</b></p> <p>5   Q. All right. We've seen something about those and  6   obviously the different perspectives that the  7   individuals are giving you.</p> <p>8       Now, let me then come, please, to the definition of  9   LIBOR before we move on to events around the credit  10   crisis and the financial crisis. Throughout this  11   time -- and we've seen this so I'm going to take this  12   relatively quickly -- although there was guidance and  13   amplification, did the definition of LIBOR throughout  14   the time you were at the BBA, certainly until the end  15   of 2010, remain the same?</p> <p>16   A. Yes.</p> <p>17   Q. We know already that there were various discussions  18   about the definition and how it might be augmented or  19   improved or changed in any way.</p> <p>20   A. <b>There were many.</b></p> <p>21   Q. But in fact the definition, subject to some guidance,  22   remained the same?</p> <p>23   A. <b>That's correct.</b></p> <p>24   Q. If I go, please, to -- my Lord, I'm conscious I'm  25   jumping around a little bit -- paragraph 48. Now, how</p>
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<p>1 important was that definition so far as you or the BBA      2 were concerned?</p> <p>3 <b>A. Well, it's fundamental. It is the basis for everything</b>      4 <b>that is built on top of LIBOR, the rate itself, and of</b>      5 <b>course then the huge numbers of financial products that</b>      6 <b>use LIBOR as its benchmark.</b></p> <p>7 Q. What would any deviation from that definition mean or      8 result in?</p> <p>9 <b>A. Potentially inaccurate LIBOR rates being set.</b></p> <p>10 Q. With what effect? To what effect?</p> <p>11 <b>A. People could potentially lose money.</b></p> <p>12 Q. Now, in terms of the definition of LIBOR, at any point      13 during the course of your employment with the BBA was      14 the BBA ever prepared to let that definition be ignored      15 or not adhered to?</p> <p>16 <b>A. No.</b></p> <p>17 Q. Did the BBA ever endorse any deviation; that is to say,      18 endorse or approve any deviation from the definition?</p> <p>19 <b>A. No.</b></p> <p>20 Q. You have told us -- my Lord, again jumping ahead to      21 132 -- that the definition itself was subject to      22 continuous review throughout this period, 2005 to 2010.</p> <p>23 <b>A. That's correct.</b></p> <p>24 Q. In terms of the communication of that definition to not      25 merely the banking world but to the wider world, how was</p>	<p>1 <b>Now, before the credit crunch that was not</b>      2 <b>a difficult question to answer because banks frequently</b>      3 <b>went into the interbank borrowing markets and borrowed</b>      4 <b>money, so it would be a trivial matter to set your LIBOR</b>      5 <b>almost. You could look at the last time you did that</b>      6 <b>sort of transaction and say, "Well, that's my LIBOR",</b>      7 <b>but those transactions became fewer and fewer and at</b>      8 <b>certain times there was very, very little or no activity</b>      9 <b>in these markets and, yet, we were told that we had to</b>      10 <b>set LIBOR rates.</b></p> <p>11 <b>So that puts a great deal of strain on the LIBOR</b>      12 <b>definition and the contributing banks.</b></p> <p>13 Q. In terms of the FXMMC, did it take any steps to try and      14 ensure that banks could do this or could cope with this,      15 anything such as that?</p> <p>16 <b>A. Well, yes, we launched a consultation in which we asked</b>      17 <b>the entire market, not just LIBOR banks but everybody,</b>      18 <b>literally anybody who could want to was invited to</b>      19 <b>respond, with, "Please, do you have any bright ideas for</b>      20 <b>how we can improve LIBOR or help us to set accurate</b>      21 <b>rates for the market in these difficult times?"</b></p> <p>22 Q. Was it ever thought appropriate that one could simply      23 fundamentally change that definition?</p> <p>24 <b>A. Yes, and that was discussed. That presents its own</b>      25 <b>difficulties because there are large numbers of</b></p>
<p>Page 121</p> <p>1 that communicated?</p> <p>2 <b>A. Well, it was at all times on our website and any</b>      3 <b>additional guidance was posted on our website. It was</b>      4 <b>several times given to the contributing banks in</b>      5 <b>e-mails. It was laid out in consultation documents.</b>      6 <b>Whenever I was speaking at a conference or discussing</b>      7 <b>with the media, I would refer to it. It was very widely</b>      8 <b>available and we did our best to ensure that it was as</b>      9 <b>well understood as possible. The BBA's published on</b>      10 <b>numerous occasions various guides, written for both</b>      11 <b>professionals and lay people, to try and explain it as</b>      12 <b>clearly as we possibly could.</b></p> <p>13 Q. Of course the definition refers to what one might call      14 a pure cash rate?</p> <p>15 <b>A. That's correct.</b></p> <p>16 Q. 2007/2008, when cash was scarce, how did that affect the      17 definition? Did that put any strain on the definition?</p> <p>18 <b>A. A great deal.</b></p> <p>19 Q. Just tell us how?</p> <p>20 <b>A. Because the rate -- the definition of LIBOR is in the</b>      21 <b>form of a question that a bank that is submitting to</b>      22 <b>LICBOR needs to answer and that question is:</b>      23 <b>"If I was to go into the interbank market and ask to</b>      24 <b>borrow a sum of money in a given currency, how much</b>      25 <b>would it cost me?"</b></p>	<p>Page 123</p> <p>1 financial products that have lifespans of decades that      2 reference LIBOR. So, for example, many people have      3 their mortgage linked to LIBOR and if you have 15 or      4 20 years left on your mortgage and you took out      5 a mortgage based on LIBOR and then it fundamentally      6 changes, it will fundamentally change the interest rate      7 you have to pay on your mortgage, for example, which      8 could be much higher or much lower.</p> <p>9 So, again, it could cost people, but in these sort      10 of circumstances you have what is called a market      11 disruption clause and this is if there is a fundamental      12 change to a financial contract under certain      13 circumstances it can be ripped up and nobody -- but that      14 hadn't happen in these circumstances. Nobody knew what      15 would happen. So we were, as the BBA, encouraged to      16 ensure, as far as possible, continuity so that these      17 circumstances wouldn't happen.</p> <p>18 Q. Now, within the context of the definition you have been      19 asked, have you not, to give detail to essentially three      20 different types of activity which might be inconsistent      21 with the definition?</p> <p>22 <b>A. Yes.</b></p> <p>23 Q. You have called them type 1, type 2 and type 3; yes?</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. We're going to look at these and see the development of</p>

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<p>1 these in some of the documents. First of all, can      2 I just identify, and you have set it out in fact in      3 paragraph 50 of your witness statement, what do you mean      4 by type 1 behaviour, just so that we're all clear about      5 it?</p> <p>6 <b>A. So type 1 behaviour is where a bank has not based its      7 submission on the rate at which it could borrow cash      8 because there is no cash in the market available to be      9 borrowed, at which point you have to use other related      10 information to try and submit a LIBOR that is as      11 accurate as you possibly can.</b></p> <p>12 Q. So it's not strictly and formally based on the rate at      13 which it is borrowing cash because it hasn't borrowed      14 cash?</p> <p>15 <b>A. LIBOR was never the rate at which you were borrowing      16 cash; it was the rate at which you could borrow cash at      17 11 o'clock in the morning with some other conditions      18 attached.</b></p> <p>19 Q. But where there were no cash transactions at all, how      20 easy is it to come up with that sort of figure?</p> <p>21 <b>A. That depends on what is going on in other related      22 markets.</b></p> <p>23 Q. We saw a reference a little earlier, and you expanded      24 this slightly, to the derivatives market in relation to      25 one of your contact notes; yes?</p>	<p>1 <b>A. Definitely.</b>      2 Q. Therefore, that isn't exactly within the definition, is      3 it?      4 <b>A. Well, because you're being asked the rate at which you      5 could borrow or the rate you think that you could      6 borrow, I think that is within an interpretation of the      7 definition of LIBOR.</b>      8 Q. Right.      9 <b>A. Sorry, shall we say within the spirit of the definition      10 certainly.</b>      11 Q. That's one aspect of derivatives and how one might use      12 that in forming a view. What about a trader or      13 a trader's desk's position, i.e. where they might want      14 it fixed, where they might want a rate for their book?      15 <b>A. That's clearly not within the spirit or the letter of      16 the definition.</b>      17 Q. We'll look at one or two examples of that in due course.      18 Let's look at the behaviour which you've called      19 type 2 behaviour which you have set out at paragraph 55.      20 Now, just define, please, what you mean by type 2      21 behaviour?      22 <b>A. Type 2 behaviour is where a bank works out what its cost      23 of borrowing would be. So what its LIBOR rate -- what      24 its LIBOR submission should be and then chooses to put      25 in a different number, almost always a lower number, in</b></p>
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<p>1 <b>A. Yes.</b>      2 Q. Is that the sort of thing you're talking about relating      3 to other markets?      4 <b>A. Correct.</b>      5 Q. So how might that market inform a submitter as to the      6 rate at which to submit a particular LIBOR submission?      7 <b>A. So cash markets involve actual movements of chunks of      8 real cash which represents real risk and a derivative      9 market is usually a much more liquid market, and by that      10 I mean there's more trading going on. So if a cash      11 market doesn't trade for days, a derivative market might      12 trade many times a day and if you know that your LIBOR      13 rate has historically been very closely tied to the      14 movement in a certain derivative rate, you could infer      15 that, "Although I haven't traded cash, I know that      16 typically it costs me 5 basis points to borrow cash      17 above this particular derivative instrument" and so it      18 would not be unreasonable to say, "I haven't traded      19 cash. I know that typically I'm 5 basis points above      20 this rate. Therefore, my rate for the LIBOR submission      21 today is 5 basis points above where that derivative      22 market is at 11 o'clock".      23 Q. So as the financial crisis took hold, did that sort of      24 calculation become or that sort of basis for calculation      25 become more common as far as you could see?</b></p>	<p>1 <b>order to not be seen as risky.</b>      2 Q. The jury have seen this on occasion being referred to as      3 low-ballng?      4 <b>A. That is one of the ways that this is called, yes.</b>      5 Q. Which specifically talks about -- when you say usually      6 a lower number, specifically talks about there being      7 a lower number input than is the actual cost?      8 <b>A. Correct.</b>      9 Q. Or the perceived cost?      10 <b>A. Yes.</b>      11 Q. You say in order not to be seen to be risky. Again, we      12 have heard something about that because a higher      13 number could suggest to others that that bank is having      14 trouble getting funds at rates that other banks can?      15 <b>A. Yes, that's right.</b>      16 Q. The damage that that causes a bank?      17 <b>A. Well, it was certainly felt by contributing banks,</b>      18 <b>I think, that that could be extremely damaging to the</b>      19 <b>reputation of a bank. Remember that this is taking</b>      20 <b>place in an environment in which banks not only could</b>      21 <b>fail but did fail and these failures may have been</b>      22 <b>because the banks were broken or it may have just been</b>      23 <b>because the market started believing that they were</b>      24 <b>broken and so nobody would lend to them and so that</b>      25 <b>action in itself led to the banks becoming broken,</b></p>
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<p>1      a self-fulfilling prophecy.</p> <p>2    Q. That activity, what I'm going to call in shorthand 3       low-ballng, was that within the definition?</p> <p>4    A. No.</p> <p>5    Q. Was that, as it were, permitted or condoned by the BBA?</p> <p>6    A. Never.</p> <p>7    Q. Did you have reports coming to you of that happening?</p> <p>8    A. Yes.</p> <p>9    Q. Did you seek to address those reports?</p> <p>10   A. By every means we felt we had available to us.</p> <p>11   Q. Of course we have heard the BBA aren't a regulator.</p> <p>12   A. No, that's true.</p> <p>13   Q. It's a trade association.</p> <p>14   A. Correct.</p> <p>15   Q. Its members are the banks themselves?</p> <p>16   A. Yes.</p> <p>17   Q. As far as the FXMMC is concerned, individuals were 18       members of the banks?</p> <p>19   A. Most of them were.</p> <p>20   Q. Were they not all members of the banks or the panel 21       banks I mean?</p> <p>22   A. No. One of the actions that we took was to widen the 23       membership of the Foreign Exchange and Money Markets 24       Committee and so we had a representative of the Chicago 25       Mercantile Exchange, we had a representative of the</p>	<p>1      time.</p> <p>2    Q. Was that compatible with the definition of LIBOR?</p> <p>3    A. No.</p> <p>4    Q. Was it remotely compatible with that definition?</p> <p>5    A. No.</p> <p>6    Q. At the time, so 2007, 2008, 2009 and 2010, did you 7       yourself actually become aware of it?</p> <p>8    A. No.</p> <p>9    Q. Looking back on it you have now seen some documents, 10       have you not, in the course of making your witness 11       statement, where there appear to be some indications of 12       it, if I can just put it in neutral terms? Did you 13       recognise any of those indications at the time?</p> <p>14   A. No.</p> <p>15   Q. When was the first that you yourself became aware of 16       this sort of type 3 behaviour?</p> <p>17   A. It was in -- I forgot the exact date, but it was when 18       the CFTC, which is a US regulator, issued a fine to 19       Barclays for that sort of behaviour, the type 3 20       behaviour.</p> <p>21   Q. I am going to suggest that is June/July 2012.</p> <p>22   A. Yes, that sounds right.</p> <p>23   Q. Did you, while you were at the BBA -- forgive me, let me 24       be more specific than that. Up until the end of 2010, 25       did you have any suspicion that this sort of activity</p>
<p style="text-align: center;">Page 129</p> <p>1      London Money Markets Association and a representative of 2       the Association of Corporate Treasurers. We should 3       clarify that by representatives, they are the same as 4       the other members. They are individuals, they just 5       happen to be employed by those bodies.</p> <p>6    Q. Did you yourself devote time and energy in seeking to 7       address issues of low-ballng?</p> <p>8    A. It was what I spent an awful lot of 2007, particularly, 9       and 2008 trying to do, yes.</p> <p>10   Q. Were you ever prepared to give the impression to anyone 11       that this sort of activity was permissible as far as the 12       BBA was concerned?</p> <p>13   A. No.</p> <p>14   Q. Now, I'm going to then turn to type 3 behaviour. You 15       have again set this out at paragraph 58 so can we be 16       clear precisely what this means. Help us with what you 17       mean by type 3 behaviour?</p> <p>18   A. So type 3 behaviour would be when somebody takes 19       a position. If you like, in very, very crude terms, 20       bets on an outcome which might be that LIBOR is going to 21       go up or LIBOR is going to go down, and they would then, 22       having made those bets or taken those positions or 23       structured their book -- they all mean the same sort of 24       thing -- they would then seek to try and get the LIBOR 25       to move in that particular direction at that particular</p>	<p>1      was taking place?</p> <p>2    A. None.</p> <p>3    Q. Could you conceive of that sort of activity taking 4       place?</p> <p>5    A. It's not -- it's not impossible as a thought experiment. 6       You would need -- because, I mean, LIBOR is a fairly 7       simple idea. It is a number of banks putting in 8       a number and if enough of them moved together in the 9       same way, the topping and tailing effect would cease to 10       be effective and the LIBOR rates would move.</p> <p>11   Q. I am just going to take you, please -- I am sorry, 12       my Lord, I'll have to come back to it. (Pause)</p> <p>13   Can I just then deal with one or two events in 14       order, if we can. Can I take you, please, and ask to 15       have on screen to JME/0010. The jury have heard little 16       reference to this but just so we have it in the 17       chronology. This is September 2007. It's dated the 18       25th and someone has written on there, "Published 19       26 September". Do you know whose writing that is?</p> <p>20   A. I don't, but I don't think it's mine.</p> <p>21   Q. Okay. It's written by a report on the Financial Times, 22       headed, "LIBOR's value is called into question". 23       In recent weeks the BBA, a trade body in London, 24       has embarked on a novel briefing mission. 25       "While the BBA used to receive few requests for</p>

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<p>1 information about how it compiles LIBOR, it has recently      2 been bombarded with queries about this benchmark.      3 Consequently, trade bodies started disseminating those      4 rates to a wider audience for the first time, together      5 with notes explaining how the benchmark works."</p> <p>6 Summarising:      7 "This is unsurprising as the credit squeeze has      8 spread. The LIBOR benchmark has risen relentlessly.      9 Observers have seized on these rates as a handy visible      10 litmus test of banking stress, not least because the      11 rest of the interbank market tends to be very opaque and      12 thus not easily monitored. While these pressures propel      13 LIBOR into public view, it has come at the very moment      14 when some banks are quietly starting to question its      15 value. In particular recent turmoil has prompted      16 suggestions that LIBOR is no longer offering such an      17 accurate benchmark of borrowings costs as before. As      18 a result, some bankers are beginning to suggest that the      19 status of these indices may need to be reconsidered in      20 the future. Says the treasurer of one of the largest      21 City banks, without being named: 'The LIBOR rates are      22 a bit of a fiction. The number on screen doesn't always      23 match what we see'. That is unsurprisingly rebuffed by      24 those who compile the index each day."</p> <p>25 I know there's more to come and the article</p>	<p>1 of low-ballng?      2 <b>A. Yes.</b>      3 Q. Can we then look, please, at the sort of steps that you      4 took and the BBA took in relation to allegations of      5 low-ballng.      6 <b>A. Hmm, hmm.</b>      7 Q. First of all, did you yourself or within the BBA receive      8 specific, as it were, detailed allegations of      9 low-ballng?      10 <b>A. We would hear repeated allegations that were never</b>      11 <b>actual smoking guns. It was a strong suggestion and</b>      12 <b>some of it was general, some of it was more specific,</b>      13 <b>but, yes, I think it's fair to say that as we go</b>      14 <b>through 2007 and into 2008 there is sustained suggestion</b>      15 <b>that this is going on in the markets.</b>      16 Q. What did you do about it?      17 <b>A. Well, first of all, we asked our committee what we could</b>      18 <b>do to try and shore up the rates, to make sure they were</b>      19 <b>as accurate as possible. We wrote regularly to the</b>      20 <b>contributing banks, reminded them of the definition,</b>      21 <b>urged them to submit accurate rates, underlined the</b>      22 <b>importance of submitting accurate rates and then,</b>      23 <b>in 2008, we -- Angela wrote to --</b>      24 Q. This is Mrs Knight?      25 <b>A. Mrs Knight, sorry, the then chief executive of the</b></p>
<p>Page 133</p> <p>1 continues over the page and the next page. Without      2 looking at all of that, was that the start of the      3 publicity about LIBOR and its position within the credit      4 crunch?      5 <b>A. I don't know if that's the very first, but that was an</b>      6 <b>example of an early article written about LIBOR.</b>      7 Q. Were there further articles in the course particularly      8 of the following year?      9 <b>A. Yes.</b>      10 Q. The jury have seen reference to a couple of them      11 in 2008. I'm not going to go back to them, but in      12 particular the Wall Street Journal and Bloomberg. Was      13 LIBOR the subject of, as it were, both interest and      14 criticism?      15 <b>A. Yes.</b>      16 Q. And the criticism in broad terms being what?      17 <b>A. That LIBOR was not reflective of the true cost of</b>      18 <b>borrowing in the interbank market.</b>      19 Q. What steps did the BBA take in relation to those?      20 <b>A. We had many repeated meetings of the committee whose job</b>      21 <b>it is to oversee LIBOR to ask them, firstly, did they</b>      22 <b>agree, did they think it was accurate or inaccurate and,</b>      23 <b>secondly, what could be done to ensure that it was as</b>      24 <b>accurate as possible.</b>      25 Q. Was one of the principal criticisms around this question</p>	<p>Page 135</p> <p>1 <b>BBA -- wrote to the chief executives of all of the</b>      2 <b>participating banks to urge them to ensure that the</b>      3 <b>rates were accurate. We built a much stronger</b>      4 <b>surveillance and governance and discipline regime and we</b>      5 <b>asked absolutely everybody in the markets what can we do</b>      6 <b>to ensure that these rates are as accurate as possible.</b>      7 <b>We tried very hard to get as much support for setting</b>      8 <b>accurate LIBOR rates because we viewed that as being</b>      9 <b>very important.</b>      10 Q. Why was it so important?      11 <b>A. Well, a number of reasons, the most fundamental being</b>      12 <b>that there were large numbers of financial products that</b>      13 <b>were based on LIBOR that people could be losing money on</b>      14 <b>if the rates weren't accurate and also it was a major</b>      15 <b>reputational problem for the British Bankers</b>      16 <b>Association.</b>      17 Q. We have seen, and I'm just going to refer to it very      18 briefly, in our core bundle, at tab A, page 6A, and on      19 screen, please, it's SJS/0003. We looked at this      20 yesterday, Mr Ewan, in fact through your erstwhile      21 colleague Mrs Scutt, so we're not going to go back      22 through it again, but one of the documents we have      23 looked at is this consultative paper from the BBA      24 in June 2008.      25 <b>A. Yes.</b></p>

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<p>1 Q. In a sentence, the purpose of this?</p> <p>2 A. It's to try and explain what LIBOR is and to try and ask 3 the widest population of people to help us ensure the 4 rates are appropriate and accurate, given the prevailing 5 market conditions.</p> <p>6 Q. What do we read into the timing of this at June 2008? 7 We know that in fact this was right in the middle or at 8 the very height or towards the very height of the 9 financial crisis.</p> <p>10 A. Yes.</p> <p>11 Q. Is this the time of what was perceived to be strain on 12 the definition?</p> <p>13 A. Yes.</p> <p>14 Q. We also see, just in the context of the events, at core 15 bundle A/7. We'll just look at this on screen. We have 16 obviously seen it before. We have clarification. We 17 have discovered that the purpose of that in terms of the 18 government guarantee scheme, the importance of it being 19 unsecured rates. So we'll, as it were, pass over that. 20 This of course comes about three months after the 21 collapse of Lehman Brothers.</p> <p>22 Then going ahead, please, to A/9. Can we have the 23 whole document so that Mr Ewan can see it. You can see 24 that this is in July of 2009 from yourself to the BBA 25 distributionlist. Who was on that list, can you</p>	<p>1 all contributors. There should be nothing in the 2 documents that represents a change to current practices 3 but it will enable us to demonstrate that all 4 contributors formulate their rates in a uniform manner, 5 thus underlining the accuracy of BBA LIBOR. Please sign 6 and return."</p> <p>7 I am paraphrasing that part. We have the terms of 8 reference. I'm not going to take you through the 9 details of those, but was this all about strengthening 10 what LIBOR was about?</p> <p>11 A. Yes.</p> <p>12 Q. Now, you have been asked and have looked at a large 13 number of documents, both --</p> <p>14 MR CHAWLA: Can I pause there, my Lord.</p> <p>15 MR JUSTICE COOKE: Yes. We'll have a five-minute break, 16 please, members of the jury. Thank you.</p> <p>17 (3.34 pm) (Short break)</p> <p>18 (3.45 pm)</p> <p>20 MR CHAWLA: Mr Ewan, leading up to and in the course of 21 making your statement you have been asked to look at 22 a wide range of documents, have you not?</p> <p>23 A. Yes.</p> <p>24 Q. And provided a comment in relation to those if anyone 25 seeks further information about any of those and other</p>
<p style="text-align: center;">Page 137</p> <p>1 remember, or approximately how many were on that list?</p> <p>2 A. I don't know because there may have been more than one 3 of those lists. However, I would infer that as the 4 letter is headed, "Dear Contributor", the distribution 5 list is the contributors to LIBOR.</p> <p>6 Q. There you set out: 7 "On behalf of the BBA I would like to thank you all 8 for helping to ensure that BBA LIBOR is still seen as 9 the benchmark rate for money and credit market, despite 10 the extremely difficult conditions over the last two 11 years. 12 "We appreciate that there have been times at which 13 it has been very challenging to submit accurate rates 14 but in discussion with all contributors I have noted the 15 amount of intellectual rigour that the contributors 16 apply in formulating their submissions." 17 You talk about how it has attracted commentary in 18 the media and from market participants, some of which 19 misunderstand LIBOR. You refer to the consultation 20 exercise last year, terms of reference arising out of 21 those and since then you set out that: 22 "I have worked with the FXMMC that oversees LIBOR to 23 prepare these and many contributors have also helped 24 with the drafting. The final version was agreed at the 25 last meeting of the FXMMC. I'm now circulating this to</p>	<p>1 documents; yes?</p> <p>2 A. Yes.</p> <p>3 Q. I'm just going to ask you about one or two aspects now 4 in the next 15 or so minutes before I conclude. First 5 of all, I'm just going to focus on what you have 6 referred to as type 3 behaviour. My Lord, I'm jumping 7 to paragraph 161. 8 You told us a few minutes ago that you did not know 9 or believe that type 3 behaviour was taking place. We 10 just remind ourselves, this is an attempt by a trader to 11 move LIBOR to suit a particular trading position; yes?</p> <p>12 A. Yes.</p> <p>13 Q. I asked you about whether that was ever in your 14 contemplation. Can I just take you, please, or invite 15 you to look on screen, please, at JME/0024. We can see 16 that this particular e-mail chain -- let's identify 17 exactly what it is at the moment. Let's go on to page 6 18 of this chain, so back in October 2008 you were invited 19 to a LIBOR seminar in Zurich, in Switzerland, and the 20 invitation came from Mr Schlegel of the Swiss National 21 Bank; yes?</p> <p>22 A. Yes.</p> <p>23 Q. You were asked to give a short presentation on the 24 concept of the LIBOR and the problems that had arisen in 25 the current money market turmoil. You are told that</p>

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<p>1 Mr Schlegel is currently analysing the contributing      2 behaviour in the Swiss franc LIBOR panel:      3 "Looking forward to discussing the preliminary      4 finding with you in the seminar."      5 In the event, at page 2 of this document, on      6 18 December of 2008 you put your comments on a paper      7 that has been supplied to you; yes?      8 <b>A. Yes. That seems to be what this is, yes.</b>      9 Q. We can see that there's reference to BIS LIBOR      10 March 2008. BIS, Bank of International Settlements?      11 <b>A. Correct.</b>      12 Q. You say here, and can we just look at this document,      13 please, or these comments over this page and the      14 following page:      15 "Martin, as discussed, here are our comments on the      16 paper."      17 Just turning to page 4, please, we can see -- just      18 scrolling down slowly -- that these are your comments,      19 signed by you.      20 So back to page 2, please:      21 "The quality of the LIBOR has repeatedly been put      22 into question."      23 Are these now your comments:      24 "It is certainly true that there has been commentary      25 on LIBOR"?</p>	<p>1 is the case even during the stress period."      2 You attach the full report which is the attachment      3 that we can see at the top of the document, the      4 March 2008 document; yes?      5 <b>A. Hmm, hmm.</b>      6 Q. You refer to the article by Mollincamp and that's an      7 article in --      8 <b>A. The Wall Street Journal.</b>      9 Q. That's it. Thank you.      10 "... in the journal [as you say] is very widely      11 quoted. Essentially its point is that if you accept CDS      12 rates..."      13 Is that certificates of deposit?      14 <b>A. No, that's credit default swap.</b>      15 Q. "... as a good proxy for bank creditworthiness LIBOR is      16 inaccurate. My view and the view of the majority of the      17 participant is that this is fraud."      18 You set out two reasons for it. I'm not going to      19 read through those reasons, but you set out two reasons      20 for it.      21 You quote specifically:      22 "Secondly, as a bank's profit depends partially on      23 the LIBOR it prefers a high or low LIBOR on a specific      24 date."      25 That's what was being said to you and you're now</p>
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<p>1 <b>A. Yes.</b>      2 Q. "I would venture that for every article that includes      3 'questioning the accuracy of LIBOR' there is another      4 that supports the LIBOR rates. One of the things that      5 we have observed is that the press will only report on      6 matters that they regard as being 'a story'. 'LIBOR is      7 not accurate' is a story. 'LIBOR is as accurate as is      8 practicable possible in difficult market conditions' is      9 not and so it does not get printed. I would note that      10 the IMF [International Monetary Fund] and BIS have both      11 looked into the following press speculation and are of      12 the view that broadly LIBOR is accurate, although they      13 do no specifically investigate Swiss franc."</p> <p>14 You give conclusions that the IMF have set out:      15 "Although the integrity of the US dollar LIBOR      16 fixing process has been questioned by some market      17 participants in the financial press, it appears that      18 US dollar LIBOR remains an accurate measure of a typical      19 creditworthy bank's marginal cost of unsecured US dollar      20 term funding..."</p> <p>21 You give the reference to the website.      22 Similarly, so far as the Bank of International      23 Settlements is concerned, you quote:      24 "The design of the LIBOR fixing producing an      25 estimate that is close to the true interbank rate. This</p>	<p>1 commenting on it afterwards, aren't you, in the small      2 print?      3 <b>A. I believe so, yes.</b>      4 Q. So the larger print is things that you are specifically      5 addressing and the smaller print are your comments to      6 that?      7 <b>A. Yes.</b>      8 Q. "As a bank's profit depends partially on LIBOR, it      9 prefers a high or low LIBOR on a specific date" is what      10 is being said to you.      11 You say this:      12 "I think there are three assumptions here. We know      13 that banks that quote LIBOR use the LIBOR rates as their      14 own internal funding rates, as well as borrowing and      15 lending based on spreads to LIBOR. For the above to be      16 true, the bank would need to be very long or short      17 against LIBOR as well as      18 "2. The various departments that were taking      19 exposure to LIBOR would need to be in constant detailed      20 contact with each other which would contravene rules      21 about 'Chinese Walls' and finally      22 "3. The department that stood to profit from      23 a manipulated LIBOR would have to persuade the      24 individual with responsibility for submitting the rate      25 that they should manipulate their true cost of funding.</p>
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<p>1 Quite apart from any moral questions or fear of  2 sanction, we require the individual ultimately  3 responsible for submitting LIBOR to be each bank's  4 treasurer or head of balance sheet or equivalent and  5 they would presumably be damaging their own interests by  6 submitting an inaccurate LIBOR."</p> <p>7 What was the point that you were seeking to make  8 there?</p> <p>9 A. Could we -- could I ask, could we scroll up so I can see  10 the quote?</p> <p>11 Q. The second was:</p> <p>12 "Secondly, as a bank's profit depends partially on  13 the LIBOR, it prefers a high or low LIBOR on a specific  14 date."</p> <p>15 There are three assumptions here. Scroll down,  16 please.</p> <p>17 A. Yes, could you repeat the question then?</p> <p>18 Q. What was the point you were seeking to make here?</p> <p>19 A. That a bank does not prefer a high or a low LIBOR in  20 particular for the reasons that I set out here. In the  21 first case, I was told by contacts, people on the  22 Foreign Exchange and Money Markets Committee, that banks  23 as banks don't particularly want a LIBOR to be very high  24 or very low because these banks have to both borrow and  25 lend against LIBOR. So if they -- so putting it up or</p>	<p>1 the case and so we believe, at this point, because all  2 of the banks have told us, that their LIBORs are being  3 set by people who lend and borrow actual money for the  4 banks. If they set artificial LIBORs, they would be  5 potentially damaging themselves and so it would seem --  6 it seemed to me, at the time, that it would be  7 ridiculous to assume that a bank would -- that somebody  8 would do that, apart from, as I note, the fact that it  9 would simply be wrong and it would -- it should get you  10 in trouble with your bank's compliance department that  11 are the people who are in charge of enforcing either the  12 bank's own internal rules or the rules from the  13 financial regulator.</p> <p>14 Q. All right. Then I am just going to take it on, please,  15 because at 2.2 you then deal with what is called, "The  16 bank's incentives". You set out this:</p> <p>17 "In addition to the points made above, in the case  18 of bank holding assets conditioned on three-month LIBOR,  19 the rate contributor only has an incentive to manipulate  20 his bank's LIBOR if it will profit him directly. If the  21 asset is held by another department within the bank,  22 even if the contributor is aware of this, why would he  23 wish to manipulate the bank's LIBOR to suit this?"</p> <p>24 Again, please, just help us with this. What is the  25 point you're making here?</p>
<p>Page 145</p> <p>1 down is just giving with the one hand and then taking  2 away with the other. So it's not in a bank's interest  3 for a higher or low LIBOR.  4 The second point is that, quite apart from anything  5 that the BBA has said in our terms of reference, all of  6 the banks that contribute to LIBOR are regulated by  7 their own financial regulator or financial regulators  8 and they will have rules which the banks have to abide  9 by about Chinese Walls.  10 Would you like me to clarify or --  11 Q. Just a little, if you would?  12 A. A Chinese Wall is essentially -- it's not a physical  13 wall but it's a set of rules and controls that mean that  14 a bank -- the part of a bank that is engaged in one  15 activity shouldn't be talking about it with another. So  16 a classic example would be that the people in a bank  17 that trade stocks shouldn't be talking to other people  18 in the same bank that might be advising on an initial  19 public offering or a merger or an acquisition.  20 Q. Yes, all right.  21 A. So that's not a BBA thing, that is the rules put in  22 place by regulators.  23 Now, the third is that LIBOR is set by people who  24 borrow and lend cash. Now, that's by this point banks  25 have signed undertakings to assure the BBA that that is</p>	<p>1 A. Well, without the benefit of hindsight, putting  2 myself --  3 Q. Dealing with it as you thought at the time?  4 A. As I thought about it then, which was I believe we're at  5 the very tail-end of 2008?  6 Q. Correct.  7 A. The people who are submitting LIBOR rates borrow and  8 lend cash. They do not -- they're not the people who  9 trade in the derivatives that are linked to LIBOR.  10 Q. Was that your understanding at the time?  11 A. Absolutely, and we had in fact by this point written  12 submissions from all of the banks assuring us that this  13 was the case. So at the time it seemed -- it would seem  14 very strange. Why would somebody do something that  15 would potentially lose them money to help out somebody  16 else in another department? It's not like that was  17 going to do him good.  18 Q. So at this time, in December 2008, did you conceive it  19 as a realistic possibility that traders were  20 manipulating LIBOR?  21 A. I did not.  22 Q. Up until the publication of the CFTC notice  23 in June 2012, did you conceive that as a realistic  24 possibility?  25 A. I did not.</p>

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<p>1 Q. Would that possibility ever fall or could that 2 possibility ever fall within the definition of LIBOR? 3 A. No. 4 Q. In contrast, you have told us that you were aware of 5 low-balling from 2008 onwards? 6 A. We were aware of -- 7 Q. Allegations -- 8 A. -- increasingly strident allegations. 9 Q. Do you remember having any allegations or concerns about 10 yen LIBOR ever being brought to your attention? 11 A. I don't remember any specifics, no. 12 Q. Can you remember which currencies formed the focus of 13 the concern that were brought to your attention? 14 A. Overwhelmingly dollar and then sterling and then, to an 15 extent, Swiss franc. 16 MR CHAWLA: Mr Ewan, that's all the questions I have. There 17 will be more for you, please. 18 MR HAWES: I don't think anyone would have a heavy heart if 19 I applied to your Lordship not to start the 20 cross-examination at 4 o'clock on a Friday afternoon. 21 MR JUSTICE COOKE: I am sure no one would have a heavy 22 heart, but is it the most efficient way of proceeding? 23 MR HAWES: It is the most efficient way. My learned friend 24 and I are going to try and sort some documents and, 25 given the length I was with Ms Scutt today, I am going</p>	<p>1 Mr Ewan's exhibits, whether I've referred to them or 2 not, but failed because the file was too big. I will 3 get those on a memory stick. 4 MR JUSTICE COOKE: That would be the ideal. Thank you. 5 MR CHAWLA: I will make sure that they come through. We're 6 going to -- in the e-mail that failed I said I was going 7 to liaise with Mr Hawes in relation to documents that 8 are likely to be pulled up next week so that at least 9 my Lord has them hopefully electronically, possibly in 10 both formats, as they're coming up. I still want to 11 talk to Mr Hawes about the best way of getting this 12 information to the jury. 13 MR JUSTICE COOKE: Yes. I mean, it's plainly a difficult 14 thing. 15 MR CHAWLA: It's terrible. It's something we have been 16 exploring for a number of years now in terms of how we 17 do this and there are different schools of thought. The 18 preferred option at the moment is to ensure that there's 19 that library of materials available, not necessarily in 20 six copies for the jury but at least in a couple of 21 copies, so that they have the ability to refer to them 22 but that involves obviously making sufficient note to 23 know what they want to look at. 24 MR JUSTICE COOKE: That's the problem. Immediacy, isn't it? 25 MR CHAWLA: In fact on one occasion, my Lord, I should say</p>
<p style="text-align: center;">Page 149</p> <p>1 to try to cut some of those down. 2 MR JUSTICE COOKE: If you are telling me that's the most 3 efficient way of proceeding, then the jury, heavy heart 4 or not, will go home. 5 Thank you very much, members of the jury. 6 10 o'clock on Monday, please, and have a good weekend. 7 (In the absence of the jury) 8 MR JUSTICE COOKE: So can we just explore what may -- 9 MR CHAWLA: Could I invite the witness to withdraw. 10 MR JUSTICE COOKE: It's more questions of timetabling and 11 the like. Feel free to go. Thank you very much. 12 (The witness left court) 13 MR CHAWLA: My Lord, before we come to timing, can I just 14 deal with a little bit of housekeeping, if I may? 15 MR JUSTICE COOKE: Yes. 16 MR CHAWLA: I've sent to your clerk by e-mail the 17 documents -- in fact a wider range of the documents that 18 were referred to this morning. 19 MR JUSTICE COOKE: Yes. 20 MR CHAWLA: So that my Lord should have those 21 electronically. 22 MR JUSTICE COOKE: Will they go on to a memory stick? 23 MR CHAWLA: I can put them on a memory stick. 24 MR JUSTICE COOKE: I can put them on to a memory stick. 25 MR CHAWLA: I have tried to do the same with all of</p>	<p>1 that the jury asked the court if they could sit without 2 counsel at all simply to review that library of material 3 before speeches, which seemed a very sensible solution, 4 but it obviously took a day -- I think it took them 5 a day and a half to do that. 6 MR JUSTICE COOKE: Mmm. 7 MR CHAWLA: So we will give that a little further thought. 8 Ms Jones has lot of practical solutions, including for 9 example, a hot documents pack, but whether that will 10 quite do it. We'll think about what the best course for 11 that is. 12 MR JUSTICE COOKE: Yes. I suspect at the end of the day 13 that much more, Mr Hawes, will depend not on the detail 14 as such but, as I was suggesting to them, on the broad 15 themes that you're putting. 16 MR HAWES: Yes. There are one or two. So what we have 17 discussed over the luncheon adjournment there are 18 certainly going to be some, I suspect, one or two key 19 documents that they may want in hard copy and the rest 20 will be thematic. 21 MR JUSTICE COOKE: If they are very specific documents that 22 you know you are going to focus on, then self-evidently 23 the sooner the jury have them, the better. 24 MR HAWES: Yes. I don't want to promise too much because, 25 as your Lordship will appreciate, at the moment we are</p>

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<p>1 still reducing the documents that we have prepared.</p> <p>2 MR JUSTICE COOKE: I understand the practical problems,</p> <p>3 Mr Hawes.</p> <p>4 MR HAWES: It's the unused as well that causes me a little</p> <p>5 concern so even the documents that are coming to</p> <p>6 your Lordship, you know that over May we had the BBA</p> <p>7 disclosure so we have those in separate areas. We're</p> <p>8 going to give those – the documents that were used,</p> <p>9 those are the ones that we have given some D references</p> <p>10 to, but they will still retain their full original</p> <p>11 unused title as well so we know where the reference</p> <p>12 comes from. I'm afraid that is going to be work done</p> <p>13 over the weekend and then loaded on the system.</p> <p>14 It is, as my learned friend says, very difficult</p> <p>15 because on the one hand we're trying to keep as much</p> <p>16 electronically as possible so we don't burden the jury</p> <p>17 with it and then, on the other hand, of course they want</p> <p>18 something to scribble on.</p> <p>19 MR JUSTICE COOKE: Yes. Just looking at the draft</p> <p>20 timetable --</p> <p>21 MR HAWES: I'm going to try and shorten Mr Ewan, if I can</p> <p>22 MR JUSTICE COOKE: You always said two to three days.</p> <p>23 MR HAWES: I did, not least because, as your Lordship has</p> <p>24 identified and I suspect the jury have identified, it is</p> <p>25 thematic. There is, as you will appreciate, one or two</p>	<p>1 Mr Wadsworth, that were on the schedule that</p> <p>2 your Lordship is aware of that we were after. We have</p> <p>3 between ourselves resolved the issue concerning the</p> <p>4 compelled interviews for the four individuals held with</p> <p>5 the FCA, in the sense that the Crown, I'm told, can't</p> <p>6 get it and the regulators are not prepared to release</p> <p>7 it.</p> <p>8 MR JUSTICE COOKE: So simply not in their possession.</p> <p>9 MR HAWES: We need to think carefully about what steps will</p> <p>10 follow from that.</p> <p>11 MR JUSTICE COOKE: Yes.</p> <p>12 MR HAWES: That's the first thing.</p> <p>13 In terms of other timings, your Lordship will</p> <p>14 remember we received Mr Walshe's compelled interview</p> <p>15 some time ago. Enquiries are ongoing with him in</p> <p>16 Australia. We're trying to make contact with him</p> <p>17 frankly. We have sent correspondence. It's not been</p> <p>18 responded to. Certain steps are now being taken to see</p> <p>19 if we can make direct contact with him with someone on</p> <p>20 the ground in Australia. If -- and I don't want to</p> <p>21 pre-judge it, but let's assume the worst case</p> <p>22 scenario -- he was not prepared to give evidence,</p> <p>23 I would probably seek to apply to admit it which is --</p> <p>24 I only flag it because it's an argument we may need to</p> <p>25 have one morning.</p>
<p style="text-align: center;">Page 153</p> <p>1 topics that you need to keep dropping issues to to show</p> <p>2 the repetitiveness of it because there are certain things that</p> <p>3 Mr Ewan says he didn't know but, other than that, my</p> <p>4 learned friend Ms Collins is taking a scalpel to it as</p> <p>5 I speak.</p> <p>6 MR JUSTICE COOKE: Well done. Can we just look at the</p> <p>7 timetable though because we're effectively what, a day</p> <p>8 to a day and a half behind, is that right?</p> <p>9 MR HAWES: One day.</p> <p>10 MR JUSTICE COOKE: One day you think.</p> <p>11 MS JONES: My Lord, I think timetable-wise one day behind</p> <p>12 because we have agreed into admissions three witnesses</p> <p>13 that come later on. So although at the moment it looks</p> <p>14 like slightly more, I think it will even out.</p> <p>15 MR HAWES: On that front, can I say -- I haven't told my</p> <p>16 learned friends this yet -- towards the end of that</p> <p>17 there are two witnesses from Citi. We haven't formally</p> <p>18 concluded it but one of them we're likely not to</p> <p>19 require. So we're in discussion about that so that will</p> <p>20 shorten as well.</p> <p>21 MR JUSTICE COOKE: All right. The contingencies are</p> <p>22 disclosure application, if no agreement.</p> <p>23 MR HAWES: We've got to -- so disclosure. My learned</p> <p>24 friends have disclosed to us this week two of the</p> <p>25 compelled interviews, one from Mr Liddy and one for</p>	<p>1 We haven't resolved yet, quite frankly, and as</p> <p>2 your Lordship will understand we haven't really had time</p> <p>3 with the BBA evidence coming quickly on us, the</p> <p>4 disclosure that we had yesterday. We have discussed it</p> <p>5 between ourselves, obviously, but I envisage we may have</p> <p>6 to have some form of argument. I'm not quite sure what</p> <p>7 that will take yet and where it goes.</p> <p>8 MR JUSTICE COOKE: All right.</p> <p>9 MR HAWES: Medical is the other thing as well that we need</p> <p>10 to resolve.</p> <p>11 MR JUSTICE COOKE: Yes.</p> <p>12 MR HAWES: In terms of -- well, firstly, I think we're</p> <p>13 agreed between us that the two respective doctors are</p> <p>14 going to see one another and much under the CPR to see</p> <p>15 where the areas of agreement and disagreement are.</p> <p>16 Subject to what comes out of that meeting between them,</p> <p>17 I think obviously then the issue will arise as to</p> <p>18 whether Mr Hayes needs to be retested for the matters,</p> <p>19 as you will remember. Once that's resolved, I do</p> <p>20 anticipate clearly that we will have to have an argument</p> <p>21 as to what is admissible and what it goes to. So that's</p> <p>22 another potential discrete argument one morning,</p> <p>23 I suspect.</p> <p>24 MR JUSTICE COOKE: Yes. It's worth bearing in mind, I won't</p> <p>25 say the optimum point for such arguments to take place</p>

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<p>1 but the least disruptive point for that to take place      2 and of course the one that doesn't affect the parties      3 putting the case the way they need to, but I'm sure you      4 have that well in mind.</p> <p>5 MR HAWES: Yes. The sooner that, frankly, from our      6 perspective we understand the way in which we can use      7 it, it may be of assistance -- maybe, in a very tenuous      8 way -- in the prosecution's case, but it's not essential      9 that it is resolved at that point. I can see that we      10 can resolve this at half-time certainly, before I call      11 Mr Hayes.</p> <p>12 MR JUSTICE COOKE: It has to be resolved by then.</p> <p>13 MR HAWES: Yes, that's the point, the cut-off point      14 entirely. There's, I think, clearly a distinction      15 between trial management issues, as your Lordship has      16 indicated, and whether it goes further.</p> <p>17 MR JUSTICE COOKE: Yes.</p> <p>18 MR HAWES: In terms of mens rea.</p> <p>19 MR JUSTICE COOKE: Yes.</p> <p>20 MR HAWES: I think those are the only things on the horizon      21 in terms of the timing --</p> <p>22 MR JUSTICE COOKE: All right.</p> <p>23 MR HAWES: -- at the moment.</p> <p>24 MR JUSTICE COOKE: So by this time next week am I being told      25 that we will be up to speed on this timetable? I don't</p>	<p>1 MR CHAWLA: That's the Ewan exhibits, what you have in hard      2 copy at the moment, but what I haven't done is extract      3 the further Ewan documents and we don't actually know      4 what they are at the moment and I don't think those have      5 been finalised yet by my learned friend.</p> <p>6 MR JUSTICE COOKE: Right. That's the exercise he was      7 contemplating doing, yes.</p> <p>8 MR CHAWLA: You have the Scutt defence documents      9 electronically or your clerk should have them. I was      10 hoping that I may be able to get them in hard copy but      11 I don't know if you want those in hard copy over the      12 weekend. It will be another file to carry, I suspect.</p> <p>13 MR JUSTICE COOKE: If I've got them electronically, that's      14 probably good enough for current purposes.</p> <p>15 MR CHAWLA: My Lord, they are labelled in the way, D/1,      16 whatever, so although there are more than Mr Hawes      17 actually referred to, it is simply easier to put them in      18 one.</p> <p>19 MR JUSTICE COOKE: In terms of the transcript, I can pick      20 them up.</p> <p>21 MR HAWES: I cut away quite a lot of the documents so the      22 references are there.</p> <p>23 MR JUSTICE COOKE: Yes, yes.</p> <p>24 MR CHAWLA: My Lord, in terms of the page numbers, so there      25 are two documents with a specific page number 848 or</p>
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<p>1 know why I'm looking at Ms Jones.</p> <p>2 MS JONES: How much depends on how long my learned friend is      3 with Mr Ewan, but if in fact his cross-examination      4 reduces down to more like a day, a day and a half, then      5 we should be back on track.</p> <p>6 MR JUSTICE COOKE: Right.</p> <p>7 MS JONES: But that's the indication that I think I'm      8 getting.</p> <p>9 MR HAWES: No pressure.</p> <p>10 MR JUSTICE COOKE: No, no, but it does depend on that factor      11 rather more than anything else.</p> <p>12 MS JONES: It does, absolutely.</p> <p>13 MR JUSTICE COOKE: Right. That's helpful to know anyway.      14 Thank you very much.</p> <p>15 Can I just ask when the further electronic material      16 will be available? Will it be available to me for the      17 weekend is what I really mean?</p> <p>18 MR CHAWLA: The Ewan material?</p> <p>19 MR JUSTICE COOKE: I have some already but you are telling      20 me there's more than would fit on to a memory stick.</p> <p>21 MR CHAWLA: There's more than would be sent by e-mail. It      22 can certainly fit on a memory stick and I can do that      23 now.</p> <p>24 MR JUSTICE COOKE: If you can do that now, then I can take      25 that away with me. That would be very helpful.</p>	<p>1 something like that, those are given just the page      2 numbers in the folder that I've put them in.</p> <p>3 MR JUSTICE COOKE: All right.</p> <p>4 MR CHAWLA: But, again, when you see those on the transcript      5 you should be able to see that directly across, but I'll      6 organise that now, my Lord, and get that to you in the      7 next few minutes.</p> <p>8 MR JUSTICE COOKE: Thank you very much. All right.      9 10 o'clock, please.</p> <p>10 (4.20 pm)</p> <p>11 (The court adjourned until      12 Monday, 8 June 2015 at 10.00 am)</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
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<p>1 is in relation to that. You were asked on Friday.      2 "We saw a little reference earlier, and you have      3 explained this slightly, to the derivatives markets in      4 relation to one of your contact notes; yes?      5 "Answer: Yes.      6 "Question: So how might that market inform      7 a submitter as to the rate at which to submit      8 a particular LIBOR submission?" was the question.      9 You were asked about that and you gave your answer.      10 Then Mr Chawla said to you:      11 "Therefore that isn't exactly within the definition,      12 is it?"      13 Your response was:      14 "Well, because we're being asked the rate at which      15 you could borrow or the rate you think that you could      16 borrow and I think it is within the interpretation of      17 the definition or, shall we say, within the spirit of      18 the definition."      19 Who decides what is within the spirit of the      20 definition or not?      21 <b>A. That's a difficult question. Ultimately the Foreign Exchange and Money Markets Committee, as they are responsible for the maintenance of the definition.</b>      22 Q. Where do we see -- and we'll look at some documentation      23 together today -- the FXMMC looking at the spirit of the</p>	<p>1 <b>A. Correct.</b>      2 Q. Does that mean you took its note and minutes?      3 <b>A. Not usually, no.</b>      4 Q. Who took --      5 <b>A. But during the beginning of the period in question, perhaps in 2005/2006, yes. Later on, when I had people working with me, they would have taken the minute.</b>      6 Q. Again, we'll look at the details in a while, but I just      7 want to ask you the generalities at the moment. Do you      8 suggest that the FXMMC minutes recorded all of the      9 conversations that took place?      10 <b>A. No.</b>      11 Q. Why not?      12 <b>A. It's my experience and understanding that committee minutes generally do not record verbatim.</b>      13 Q. What about important discussions concerning the      14 interpretation of the definition, would they be minuted?      15 <b>A. I think the -- I would imagine the fact that there was discussion would be minuted. If there were important points raised, I would imagine they were minuted. If there were actions, they would be minuted, but word by word, no, that would not be minuted.</b>      16 Q. Would you agree with the proposition that the      17 interpretation of the definition within the market was      18 sometimes quite different?</p>
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<p>1 definition?      2 <b>A. Throughout the period of the financial crisis, at if not every meeting of the committee, certainly many of the meetings, that would have been the core of what they were discussing. We recognised that there were very difficult, unprecedented circumstances in the market and that the definition of LIBOR might have to adapt to suit that and so the definition was discussed frequently by the committee.</b>      3 Q. Where are the boundaries for the spirit of the definition?      4 <b>A. Again, that's a difficult question. You are asking me to quantify something that is a qualitative notion.</b>      5 Q. Because we're not talking there, are we, about the definition itself; we're talking about your words "the spirit" of the definition which is something quite different? You would agree with that, would you?      6 <b>A. No.</b>      7 Q. How long did the FXMMC meetings take?      8 <b>A. They would vary. A meeting where the committee was meeting annually to review the constituents might have taken perhaps two hours. A number of the ad hoc meetings took until the members were satisfied that whatever issue was being discussed was addressed.</b>      9 Q. You act, did you say, as the secretariat of the meeting?</p>	<p>1 <b>A. You're asking me to speculate. I couldn't say. What I could say is that at all times the BBA worked very hard to ensure that the definition was made public. We would answer questions about it. We published large amounts of guidance and discussion around the definition to try and make it as clear as possible to everybody that what the definition was, what we were trying to achieve.</b>      2 Q. If the definition had the clarity that you suggest and the interpretation of the definition was straightforward, why during 2006 to 2010 was so much clarification required about the definition?      3 <b>A. Because the market that LIBOR seeks to measure changed so utterly and so rapidly in a way that hadn't been seen for generations.</b>      4 Q. But the definition remained the same?      5 <b>A. At its heart, yes.</b>      6 Q. What does "at its heart" mean, Mr Ewan?      7 <b>A. The definition is -- and I may be slightly paraphrasing because I haven't used it for a while -- is the rate at which you as a contributor bank could raise funds in reasonable market size in the London market at 11 o'clock on a banking day. Now, that hasn't changed and we -- the reason that that has not changed is because throughout the period in question, whether by</b></p>
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<p>1 formal or informal means, we were continually consulting      2 with the market to ask that question: do we need to      3 change the definition? We had that conversation with      4 participants, with users, with Central Banks, with the      5 UK financial regulator, with the American financial      6 regulator, the Swiss National Bank, as wide a group of      7 people as we could interest in the conversation, and      8 they said the definition should not change.</p> <p>9 Q. Underlying the evidence that you have given however, and      10 we'll look at them now in a moment or two, you were      11 being constantly told about the way in which banks      12 approached the definition, weren't you?</p> <p>13 A. I'm not sure I would go as far as continually, but      14 I will certainly accept that there was -- there was      15 questions about this throughout the period.</p> <p>16 Q. Those questions illustrated a lack of consistency of      17 approach toward the definition, didn't they?</p> <p>18 A. I think they took the form more of questions which was      19 when we have a liquid cash market and we know what our      20 borrowing costs are, because we use it and borrow from      21 it, there's no issue, but when that underlying market      22 doesn't exist, what do we do? I think that is a wholly      23 legitimate question which the BBA spent an awful lot of      24 energy trying to answer.</p> <p>25 Q. Can I ask you about your three types of behaviour that</p>	<p>1 like to know when did they come into existence?      2 A. 2014.</p> <p>3 Q. Type 1 is, as you have described, behaviour where a bank      4 has not based its submission on the rate at which it can      5 borrow cash because there isn't cash, is that correct?      6 A. Yes.      7 Q. At which point the bank would use other related      8 information to try and submit a LIBOR rate. Is that an      9 accurate summary of type 1 activity?      10 A. I think the word perhaps missing there is "accurate".      11 Q. Right. Your evidence actually on Friday was as accurate      12 as you possibly can; all right?      13 Type 2, the jury have heard of low-balling. It's      14 the shorthand form for it but I just want to identify      15 with you again, before we look at some documentation,      16 what you regard type 2 as being: behaviour where a bank      17 works out what its cost of borrowing would be, so what      18 its LIBOR rate or submission should be, and then chooses      19 to put in a different number, almost always a lower      20 number, in order not to be seen as risky?      21 A. Yes. That will function as a definition of type 2 or      22 low-balling, call it what you will.      23 Q. Therefore, as the jury have heard, and I think you have      24 agreed, it is a submission of a rate to protect your      25 reputation within the market?</p>
<p>Page 9</p> <p>1 you described on Friday.      2 A. Certainly.      3 Q. You have type 1, type 2 and type 3; yes?      4 A. Yes.      5 Q. My first question is: how were those types arrived at?      6 A. They were not current terms at the time. They were      7 loose categorisations that developed as I was answering      8 questions from the Serious Fraud Office about the period      9 in question and so they are, I think, useful ways of      10 thinking about what is going on. They don't have any      11 legal or formal status and they don't have hard      12 delineations, because they are not formal terms.      13 Q. So these are not types that you recognised at the time;      14 correct, in the formal labelling of type 1, 2 and 3?      15 A. Correct.      16 Q. Who devised the types? Was it you or was it someone      17 else?      18 A. I believe that the labels that you described, type 1,      19 type 2, type 3, were first suggested by one of the      20 lawyers for the British Bankers Association.      21 Q. So they're not your types, they're someone else's?      22 A. Well, in labelling them, so type 1, type 2, type 3, yes,      23 but I think I will say that I think they are useful ways      24 of thinking about it.      25 Q. I don't want to know what your lawyers said but I would</p>	<p>Page 11</p> <p>1 A. Yes.      2 Q. It bears no relationship to the definition?      3 A. Correct.      4 Q. And, given that it is some significant way from the      5 range that one would submit for your LIBOR, it clearly      6 is in breach of the definition?      7 A. Well, the degree may or may not be significant. It's --      8 but, again, it brings us back to the spirit of the      9 definition.      10 Q. Well, I just wanted to clarify that with you because do      11 you suggest that low-balling fell within the spirit of      12 the definition?      13 A. No.      14 Q. That's what I assumed was your position but I wanted to      15 clarify it. Do you accept that there was low-balling in      16 the market at the time?      17 A. I think there was very strong evidence of that, yes.      18 Q. Because you said on Friday there was never actually any      19 smoking gun?      20 A. That's correct. I don't think I saw a smoking gun, but      21 I think we have -- I mean, we have seen throughout the      22 evidence that there have been strong suggestions that it      23 was happening, yes.      24 Q. I want to, if I may, ensure that your position is clear      25 to me so I understand it. At the time did you accept</p>

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<p>1 that there was type 2 low-balling taking place?</p> <p>2 <b>A. No. At the time I thought it was likely that it was</b></p> <p>3 <b>happening, which is why I took action, but I don't think</b></p> <p>4 <b>I ever had proof and indeed it would be very difficult</b></p> <p>5 <b>to produce absolute proof of that.</b></p> <p>6 Q. Well, proof would require, wouldn't it, Mr Ewan, someone</p> <p>7 to take some investigative steps?</p> <p>8 <b>A. It could or proof could be a participant contacting me</b></p> <p>9 <b>or somebody else at the British Bankers Association and</b></p> <p>10 <b>saying, "I just borrowed money miles away from what</b></p> <p>11 <b>I put in for my LIBOR submission this morning".</b></p> <p>12 Q. Or them contacting you and admitting that their LIBOR</p> <p>13 submission is not a true and accurate reflection of the</p> <p>14 rate?</p> <p>15 <b>A. I think that would be -- well, it's not conclusive proof</b></p> <p>16 <b>because I haven't seen a trade ticket, but, yes, I mean,</b></p> <p>17 <b>that would be, again, strong evidence that it's</b></p> <p>18 <b>happening.</b></p> <p>19 Q. Well if someone is going to contact you and say, "Our</p> <p>20 LIBOR submissions are not accurate", why is that not</p> <p>21 adequate proof?</p> <p>22 <b>A. Because against the background there is no absolute way</b></p> <p>23 <b>of defining that because, as we've discussed, at times</b></p> <p>24 <b>there is no cash market which is why we have the concept</b></p> <p>25 <b>of type 1 behaviour as well. If you don't know -- if</b></p>	<p>1 Q. All right. Type 3 you have defined as behaviour when</p> <p>2 somebody takes a position, in very crude terms, bets on</p> <p>3 an outcome which might be that LIBOR is going to go up</p> <p>4 or it's going to go down and then they would seek to try</p> <p>5 to get the LIBOR to move in that particular direction at</p> <p>6 that particular time; correct?</p> <p>7 <b>A. Yes.</b></p> <p>8 Q. We'll come back to the second part of that when we look</p> <p>9 at some documents, but let's just split that, if we may.</p> <p>10 Someone takes a position, in very crude terms, bets on</p> <p>11 an outcome which might be that LIBOR is going to go up</p> <p>12 or it's going to go down. Stop there for one moment.</p> <p>13 Isn't that what traders do every single day?</p> <p>14 <b>A. Well, yes.</b></p> <p>15 Q. So the issue really is if they seek within their ranges</p> <p>16 to try to get LIBOR to move in a particular direction?</p> <p>17 <b>A. Yes.</b></p> <p>18 Q. That's the issue?</p> <p>19 <b>A. That's the problem.</b></p> <p>20 Q. As I understood your evidence on Friday, are you saying</p> <p>21 that you did not understand that type 3 behaviour was</p> <p>22 taking place between 2006 and 2010?</p> <p>23 <b>A. I did not think it was taking place between 2006 and</b></p> <p>24 <b>2010.</b></p> <p>25 Q. So you saw no evidence that banks were fixing for reset</p>
<p style="text-align: center;">Page 13</p>	<p style="text-align: center;">Page 15</p>

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<p>1       in how this is viewed. Those banks whose main business  2       is in derivatives or loans are perfectly happy with this  3       as it's to their advantage. Those more active in the  4       cash market regard this as a problem that must be  5       addressed. The third and easily largest group recognise  6       this effect but see it as a construct of the market and  7       are unconcerned about it."</p> <p>8       My learned friend has a hard copy, like my Lord  9       does. (Handed)</p> <p>10      Have you found the page, Mr Ewan?</p> <p>11      <b>A. Yes.</b></p> <p>12      Q. LIBOR clearly was a benchmark that generated incomes for  13       the banks. They used it internally, didn't they, within  14       their treasury departments?</p> <p>15      <b>A. Yes, I think some did.</b></p> <p>16      Q. They all did, didn't they?</p> <p>17      <b>A. I don't know if I could go so far as to say that.  I know some did or some told me they did.</b></p> <p>18      Q. The importance in 2005 about the LIBOR rate is set out  19       there because banks whose main business is in  20       derivatives or loans are happy with it, to their  21       advantage. "To their advantage" means they are making  22       money out of it; yes?</p> <p>23      <b>A. That's certainly one reading of that. I must admit  I don't have a recollection of precisely what I meant</b></p>	<p>1       available. I want to ask you certain questions about  2       certain extracts. Do you understand, Mr Ewan?</p> <p>3      <b>A. Yes.</b></p> <p>4      Q. Paragraph 2:</p> <p>5       "The pound and US dollar LIBOR are set 3 to 4 basis  6       points too high each day. This is a major problem and  7       must be fixed. They submit their true rates each day  8       [that's Credit Suisse] and believe that most days they  9       are knocked out of the rate setting process in the  10       topping and tailing process as many other banks are  11       contributing inflated rates."</p> <p>12       Inflated rates are not in accordance with the  13       definition, are they, Mr Ewan?</p> <p>14      <b>A. They are not.</b></p> <p>15      Q. Do you have a memory now about what was done to that  16       piece of information?</p> <p>17      <b>A. I don't have a positive memory, but the purpose of these  relationship visits are to get market feedback to take  to the Foreign Exchange and Money Markets Committee.</b></p> <p>18      Q. Let's move on to paragraph 3:</p> <p>19       "They advised us to collect all the individual rates  20       submitted each day and analyse these."</p> <p>21       Pausing there. 2006, was that done?</p> <p>22      <b>A. I think that's 2005.</b></p> <p>23      Q. Sorry, 2005. Was it done?</p>
<p>1       <b>when and if I wrote that.</b></p> <p>2      Q. We will see on a number of occasions this in the  3       documents so let's deal with this now. The first  4       sentence in that document talks about the consensus  5       amongst banks that the US dollar and sterling rates are  6       being set 3 to 4 basis points above the true cash rate.  7       Did you regard that at that stage as an issue of  8       accuracy?</p> <p>9      <b>A. I don't think at that point I was in a position to take  that view. I didn't have the experience or the  understanding to grasp what is meant.</b></p> <p>10     Q. What about now?</p> <p>11     <b>A. If I was still the secretary of the Foreign Exchange and  Money Markets Committee and they still had  responsibility for this, I would take that to them and  attempt to have it addressed.</b></p> <p>12     Q. So you would regard that as illustrating inaccurate  information, according to the definition?</p> <p>13     <b>A. Yes.</b></p> <p>14     Q. Thank you. If we scroll down the page, please, over the  page, to Credit Suisse, so the jury can see that. Thank  you. Over your page, Mr Ewan. This is, just so the  jury understand, your visiting each of the banks. We  looked at it on Friday and, as I indicated, I'm only  going to pull up certain things. The documents will be</p>	<p>1      <b>A. I don't recall.</b></p> <p>2      Q. Do you recall when the analysis of the rates was  3       introduced?</p> <p>4      <b>A. Perhaps 2007.</b></p> <p>5      Q. All right. Back to the document:  6       "They accept that different banks have different  7       costs of capital but suspect certain banks may be  8       quoting high or low, depending on the shape of their  9       book or loan portfolio at a given point in time."</p> <p>10       What do you understand "shape of their book" to  11       mean, Mr Ewan?</p> <p>12       <b>A. I now understand that to mean whether they are long or  short.</b></p> <p>13       Q. In their derivatives?</p> <p>14       <b>A. Yes.</b></p> <p>15       Q. So you're clearly being told in 2005 that some banks are  16       suspected of quoting high or low depending on their  17       derivatives book?</p> <p>18       <b>A. Yes.</b></p> <p>19       Q. Thank you.</p> <p>20       <b>A. But, as I have said, I don't think I recognised that at  the time.</b></p> <p>21       Q. All right. Let's turn over the page, please, to HSBC.  22       Given that you didn't recognise that, let's look at  23       paragraph 2. They state that:</p>

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<p>1 "HSBC sets its position against cash each day.      2 There is no interaction between the cash team and the FX      3 or swaps team."</p> <p>4 Pausing there. That would be in accordance with the      5 definition; correct?</p> <p>6 <b>A. Yes.</b></p> <p>7 Q. "However, they suspect that certain nameless      8 contributors might be setting their rates with an eye on      9 their derivatives book."</p> <p>10 Pausing there. I know it's a long time ago,      11 nameless, were they asked?</p> <p>12 <b>A. I don't recall.</b></p> <p>13 Q. Well, I know it's you and Mr Merriman but I wanted to      14 understand that if someone is telling you then that      15 they're setting their rates or others are setting their      16 rates with an eye on their derivatives book, that,      17 I think on your account, is not in accordance with the      18 definition?</p> <p>19 <b>A. It's not.</b></p> <p>20 Q. So one would have asked?</p> <p>21 <b>A. I don't recall. Its ten years ago.</b></p> <p>22 Q. Because otherwise one is ignoring or not adhering to the      23 definition, isn't one, Mr Ewan?</p> <p>24 <b>A. All I can say is this is a very long time ago and      25 I might have been at the BBA for a fortnight or</b></p>	<p>1 10 o'clock London time for EURIBOR, then contributing      2 the same rate one hour later to the BBA."</p> <p>3 Now, I highlight that because I just wanted to ask      4 you: would that have been in accordance with the      5 definition or would that make it into the spirit of the      6 definition?</p> <p>7 <b>A. It would depend. Now, my recollection, and I wouldn't      8 want to absolutely vouch for this, but my recollection      9 was that at the time the definition of EURIBOR was quite      10 similar to the definition of LIBOR, except the question      11 being asked of the EURIBOR bank is not "at what rate can      12 you as a market participant borrow" but "can a prime      13 bank borrow".</b></p> <p>14 <b>Now, if you were a contributor to both and you      15 considered yourself to be a prime bank and you didn't      16 think that the market had moved between 10.00 am London      17 time and 11.00 am London time, that could be absolutely      18 fine.</b></p> <p>19 Q. Can I ask you this: were EURIBOR transactional based      20 rates?</p> <p>21 <b>A. No. I mean, I wouldn't want to say 100 per cent because      22 I wasn't ever responsible for EURIBOR, but I believe no.</b></p> <p>23 Q. Thank you, Mr Ewan. Shall we turn over the page,      24 please, to Bank of Tokyo, paragraph 3. He observed      25 that:</p>	
<p style="text-align: center;">Page 21</p>	<p style="text-align: center;">Page 23</p> <p>1 <b>three weeks, perhaps, and wasn't in a position to form      2 that view.</b></p> <p>3 Q. Shall we look over the page, please, at Morgan Chase,      4 paragraph 2:      5 "Pound and US dollar are higher than the true      6 position but everyone in the market knows this and      7 prices accordingly. They do not want the BBA to attempt      8 to 'correct' this."      9 Again, evidence of inaccuracy, is that right,      10 Mr Ewan?</p> <p>11 <b>A. Again, you are asking me the same question and I am      12 giving the same answer, which I don't recall the precise      13 instances and at the time I don't think I was in      14 a position to recognise the implications.</b></p> <p>15 Q. What about now, the use of the word "correct"?</p> <p>16 <b>A. And, again, if I was the secretary of the Foreign      17 Exchange and Money Markets Committee and it was in      18 charge of setting LIBOR, I would take that to them.</b></p> <p>19 Q. Below that:      20 "The cash market is shrinking. This is due to the      21 increasing use of derivatives. You can cover a 12-month      22 position with a lower capital requirement using      23 a derivative as opposed to a cash loan. They suspect      24 that certain banks that contribute to both EURIBOR and      25 BBA Euro LIBOR may be setting their euro rate at</p>	<p>1 "Sometimes LIBOR quotes are high because they are      2 set by the treasury function within the bank but then      3 goes on to use the LIBOR rate internally in the bank."</p> <p>4 Pausing there. The function that I identified to      5 you; in other words, using LIBOR internally on      6 a treasury desk to generate income for the bank, do you      7 agree with that?</p> <p>8 Let's read on to assist you:      9 "In these cases the treasury department can make      10 extra profit by charging other departments in the bank      11 itself at that artificial rate!"</p> <p>12 Two things. I'll go back to my question. Treasury      13 were driving and increasing the amount of money as      14 described there, extra profit that they can generate      15 from the other departments within the bank. Do you      16 agree with that?</p> <p>17 <b>A. That's what the record says, yes.</b></p> <p>18 Q. What do you say about the words "artificial rate"?</p> <p>19 <b>A. Let's assume that it was me that wrote this note. It      20 indicates that I am surprised.</b></p> <p>21 Q. Well, again, I'll come back to a theme. Would you or      22 Mr Merriman have asked for further details about those      23 banks for intelligence?</p> <p>24 <b>A. I don't recall whether Mr Merriman did. I don't think      25 I did.</b></p>

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<p>1 Q. Would you have taken notes other than these, other than      2 what we're looking at here? Would you have taken a note      3 of that meeting at the time?</p> <p>4 A. Well, I would have -- what I was in the habit of doing      5 was taking a notepad and making handwritten notes which      6 would -- I would then type up. So in a way, yes, but      7 that is the record of the meeting.</p> <p>8 Q. So this is the product of your notes that we're now      9 looking at?</p> <p>10 A. Yes. I mean, I can't say whether that was -- well, as      11 I say, I don't remember whether that was what I did      12 in 2005, whether it was me. It may well have been, but      13 certainly in general that is what I did.</p> <p>14 Q. Let's look at Citigroup, please, which is two or three      15 pages on. There's a different reason I want to look at      16 this with you:</p> <p>17 "EURIBOR [paragraph 2] is preferred over BBA Euro      18 LIBOR. However, Euro LIBOR is used for pricing      19 overnight for client call accounts. There is less      20 credit discrimination between EURIBOR contributors than      21 among sterling LIBOR contributors. Therefore, the Euro      22 LIBOR rates are closer to the real rate. Apparently the      23 Bank of Japan and the Ministry of Finance have made it      24 clear that they don't want to see negative BBA Yen LIBOR      25 rates being set, even if this would be reflective of</p>	<p>1 A. I don't recall.</p> <p>2 Q. Can we move, please, to JEX/002 which should be your      3 next document, Mr Ewan, in your bundle. A year has gone      4 by. This is 2006. Context. Again, is Mr Merriman      5 still in charge?</p> <p>6 A. Yes.</p> <p>7 Q. Do you remember roughly when you took over from      8 Mr Merriman?</p> <p>9 A. I think Alex Merriman left the BBA on the turn of      10 2007/2008, I think.</p> <p>11 Q. Can we just look briefly again at this document for one      12 or two other things. Look at Citigroup, please, on that      13 first page. We can do this quite quickly, I think.</p> <p>14 Paragraph 2:      15 "The rates are accurate and, what is more,      16 consistent. The Japanese rate is getting more      17 accurate."</p> <p>18 In other words, I suggest, Mr Ewan, the Japanese      19 rate had not been accurate. It's implicit, isn't it?</p> <p>20 A. It is implicit.</p> <p>21 Q. Do you agree with that?</p> <p>22 A. I agree with that, yes.</p> <p>23 Q. Had the BBA done anything about the yen rate in 2006?</p> <p>24 A. I can't remember.</p> <p>25 Q. Can we turn over the page, please, to the National</p>
<p style="text-align: center;">Page 25</p> <p>1 reality."</p> <p>2 I want to ask you two things about that. What is      3 a negative LIBOR rate? We touched on negative interest      4 rates.</p> <p>5 A. Well, there is no theoretical reason why a LIBOR rate      6 should not be negative. It's entirely possible.      7 There's no constraint that says you have to post      8 a positive rate.</p> <p>9 Q. Thank you. It follows, doesn't it, from what you've      10 written there, that the Central Banks, in this instance      11 the Bank of Japan, can have an input on to the rates      12 that are being quoted by the banks? Would you agree      13 with that proposition or not?</p> <p>14 A. That's what it says.</p> <p>15 Q. Thank you. Over the page, please, to Banca Intesa.      16 I just want to touch on this again, paragraph 2, the      17 second paragraph:      18 "Some banks always quote high or low. It's not      19 always possible to get a bank to deal at the price it      20 quotes for the LIBOR setting process."</p> <p>21 Is that again an issue of accuracy?</p> <p>22 A. It certainly could be.</p> <p>23 Q. Would you have asked for details of those banks that      24 were posting rates that were not, as you have recorded      25 there, in accordance with their LIBORs?</p>	<p style="text-align: center;">Page 27</p> <p>1 Australian Bank. 1 and 2:      2 "Fixings are good. There used to be some dodgy      3 LIBORs but they're not reliable. Without wanting to      4 point fingers, NAB suspect that some contributors are      5 not sufficiently active in the cash markets to know      6 where the market is when they quote. They jokingly      7 suggest that these people ring [REDACTED] ask where the      8 market is and then submit that as a quote. They accept      9 that these banks might be much more active in the swaps      10 market. NB: selection for LIBOR panels is based on the      11 ranking of cash activity plus 20 per cent of the swap      12 activity."</p> <p>13 The first sentence, "Not sufficiently active in the      14 cash market to know where the market is when they      15 quote". Would you regard that as an issue of accuracy,      16 or not?</p> <p>17 A. Yes.</p> <p>18 Q. Thank you. Calling an inter-dealer broker, [REDACTED] and      19 using the figure quoted to them might or might not be      20 a way in which you could submit your LIBOR, would you      21 agree with that?</p> <p>22 A. Yes, I would.</p> <p>23 Q. It comes down to the submitter's personal opinion and      24 the response from [REDACTED] in this illustration would have      25 been market colour, would you accept that?</p>

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<p>1 A. Yes.</p> <p>2 Q. Thank you. JP Morgan, please, at the bottom of that</p> <p>3 page. We can touch on this very quickly:</p> <p>4 "They think the New Zealand dollar and to a lesser</p> <p>5 extent the Australian dollar rates are based on FX</p> <p>6 forward trading, rather than the cash market. Since</p> <p>7 LIBOR is a measure of the price of borrowing funds, this</p> <p>8 does not in fact dictate the price of borrowing in that</p> <p>9 market. This is not an issue."</p> <p>10 Now, in 2006, was your rate based on FX forward</p> <p>11 trading permitted?</p> <p>12 A. If you're basing it solely on FX forwards, no.</p> <p>13 Q. It would not have been, on your account, in accordance</p> <p>14 with the definition? It follows, doesn't it?</p> <p>15 A. Yes.</p> <p>16 Q. Would you agree?</p> <p>17 A. Yes.</p> <p>18 Q. What was done with that information?</p> <p>19 A. I don't remember.</p> <p>20 Q. Can we turn to the Bank of America, which is a few pages</p> <p>21 on. Paragraph 2:</p> <p>22 "The rate setting process is currently efficient.</p> <p>23 Bank of America is often dropped from the US dollar at</p> <p>24 fixings and one month and three month but this is</p> <p>25 because they generate their LIBOR rates off the</p>	<p>1 where they could raise funds which is the return they</p> <p>2 need."</p> <p>3 What did you understand by that phrase?</p> <p>4 A. That is quite clearly inconsistent with the definition</p> <p>5 of LIBOR.</p> <p>6 Q. Thank you. What did you understand the phrase to mean?</p> <p>7 A. I don't know what I took that to mean at the time.</p> <p>8 Q. What do you take it to mean now?</p> <p>9 A. Now I take it to mean Bank of America is setting its</p> <p>10 rates 4 basis point above where they should have been</p> <p>11 submitting LIBOR.</p> <p>12 Q. It states, as we can all see, it set its basis points</p> <p>13 above where they could raise funds. It's just not</p> <p>14 accurate, is it?</p> <p>15 A. No.</p> <p>16 Q. And you're being told in 2006 that it's not accurate,</p> <p>17 aren't you?</p> <p>18 A. Yes.</p> <p>19 Q. What did you do with that information?</p> <p>20 A. I can't remember.</p> <p>21 Q. Turn to the note:</p> <p>22 "Should stabilise rates especially short-term rates.</p> <p>23 This would make the Bank of America happy as stable</p> <p>24 short-term rates will offer them certain trading</p> <p>25 opportunities."</p>
<p style="text-align: center;">Page 29</p> <p>1 derivatives market which gives them a different</p> <p>2 perspective to other banks."</p> <p>3 Mr Chawla asked you about this on Friday. I think</p> <p>4 your evidence is that is the implied rate of funds from</p> <p>5 derivative trading, is that right, Mr Ewan?</p> <p>6 A. Yes. We're now getting into the sphere of what we're</p> <p>7 calling type 1 behaviour.</p> <p>8 Q. So this is type 1. To assist the jury, that is using</p> <p>9 other sources of information for the implied rate value</p> <p>10 of cash -- value of borrowing?</p> <p>11 A. Yes.</p> <p>12 Q. In 2006 was taking an implied rate off the derivatives</p> <p>13 market in accordance with the definition?</p> <p>14 A. It would depend whether cash was available to you.</p> <p>15 Q. Let's come back to the question. In 2006 would the</p> <p>16 implied rate be available to you from the derivatives</p> <p>17 market? Would that have been in accordance with the</p> <p>18 definition?</p> <p>19 A. Well, let's assume that the derivative markets are</p> <p>20 always liquid so, yes, you could at any day work out</p> <p>21 what your LIBOR is by using the rate that is implied by</p> <p>22 the derivatives market. The point is that if you're</p> <p>23 able to borrow cash, you should be using that because</p> <p>24 that's what the definition says.</p> <p>25 Q. "Bank of America sets its rates 4 basis points above</p>	<p style="text-align: center;">Page 31</p> <p>1 What does that mean?</p> <p>2 A. Without much more information and context, I couldn't</p> <p>3 say. It may be as simple as volatile markets mean that</p> <p>4 you can lose a lot of money or a stable -- if you trade,</p> <p>5 whereas if you have a reasonable expectation when</p> <p>6 a market is going to be stable, you might be more keen</p> <p>7 to take on trades because you don't think the market is</p> <p>8 going to fall apart and you lose all of your money.</p> <p>9 I don't know.</p> <p>10 Q. Does it mean, I suggest, that the bank could trade off</p> <p>11 the curve?</p> <p>12 A. It's not -- there's no -- not enough context.</p> <p>13 Q. Well, was the context discussed?</p> <p>14 A. I can't remember.</p> <p>15 Q. Would you have noted the context anywhere else?</p> <p>16 A. I don't know.</p> <p>17 Q. Let's move to Credit Suisse, just below, please. I want</p> <p>18 to just touch on this for a single issue. At the bottom</p> <p>19 of paragraph 2:</p> <p>20 "The BBA noted that Reuters are now analysing the</p> <p>21 contributions each day and compiling lists of who quotes</p> <p>22 high, low, erratically."</p> <p>23 Now, that is in May 2006. I'm assuming, Mr Ewan, as</p> <p>24 you have noted it, that was taking place?</p> <p>25 A. Yes.</p>

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<p>1 Q. You would have taken – that would have taken place, as 2 you've noted there, through Reuters?</p> <p>3 A. Yes.</p> <p>4 Q. In the event of high, low or erratic quotes, what would 5 have happened?</p> <p>6 A. Well, the information would have been compiled for the 7 benefit of the Foreign Exchange and Money Markets 8 Committee to take what action they saw fit.</p> <p>9 Q. Can we go, please, to Deutsche Bank, over the page, 10 paragraph 2, the middle of that:</p> <p>11 "Sees the market as more volatile in the last year 12 than previously but unsecured bank funding rates are 13 nevertheless closer to LIBOR rates. The rate setting 14 process is okay and no banks try to skew it."</p> <p>15 Pausing there. Does that imply that banks had tried 16 to skew it beforehand?</p> <p>17 A. I don't -- on the face of it, that's just an 18 observation.</p> <p>19 Q. "Need to watch the yen rates. Bank of Japan ..." 20 Would you agree with that?</p> <p>21 A. Yes.</p> <p>22 Q. "Bank of Japan announcements are having profound effects 23 at the moment."</p> <p>24 This was in May 2006. Do you remember what those 25 announcements were?</p>	<p>1 as the submitter honestly submits what they believe to 2 be in their opinion the true rate, it would have been 3 a proper submission?</p> <p>4 A. Well, yes, so long as they haven't dealt in cash at 5 a different rate. Yes, that's the key.</p> <p>6 Q. Well, it's quite a fundamental point. Even if they have 7 dealt in cash at a different rate, it wouldn't 8 automatically affect their submission, would it? It 9 might, depending on how far it was away from the 10 submission.</p> <p>11 A. So I think -- if you have dealt in cash in a manner that 12 fits the LIBOR definition, i.e. in reasonable size via 13 the London Market at or about 11 o'clock in the morning, 14 that should be your LIBOR rate. There should be no 15 reason to apply any other thinking to it. There are 16 a number of reasons why you might trade cash and it not 17 be reflective of your LIBOR rate. You could be dealing, 18 for example, in extremely large or extremely small size. You could be dealing through another market. You could be dealing at a different time of day and the market's moved.</p> <p>22 Now, all of those are reasons why a cash trade might 23 not be the same as your LIBOR rate, but if you have just 24 traded something that fits the definition of -- fits the 25 definition of LIBOR, that should be what you should put</p>
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<p>1 A. I don't.</p> <p>2 Q. But clearly if we're talking in LIBOR terms, its 3 profound effects on the value of cash?</p> <p>4 A. Yes, because fundamentally one of the things that 5 Central Banks do is put up or drop base interest rates 6 which immediately feed through to LIBOR. So you would 7 fully expect if the Bank of Japan said, "Today interest 8 rates go up by 1 per cent", you would expect LIBORs to 9 follow immediately.</p> <p>10 Q. Well, look at the next sentence:</p> <p>11 "BBA LIBOR setting doesn't always react fast enough 12 to events in the market, eg Fed rate changes. DB create 13 their LIBOR rates referencing the derivatives markets as 14 cash isn't liquid or transparent enough."</p> <p>15 So clearly Deutsche are telling you that they create 16 their LIBORs for implied funding off of the derivatives 17 that they are using. Do you agree with that?</p> <p>18 A. Yes.</p> <p>19 Q. I think you have agreed that that is consistent, is it, 20 with the definition in 2006?</p> <p>21 A. It can be. It depends upon their intent. If they're 22 using these rates to fairly and accurately try and work 23 out what their true cash rate would be, there's no 24 problem with that.</p> <p>25 Q. The key, Mr Ewan, I think, is right, isn't it? As long</p>	<p>1 in.</p> <p>2 Q. I think we agree it's a subjective assessment, however, 3 of your rate. It's not transactional based, is it?</p> <p>4 A. It's not transactional based, but you are asked the 5 question: what would be your cost of funds if you took 6 this action, which is borrow money in the London Market 7 at 11 o'clock in reasonable size? Now, it therefore 8 very clearly follows if you have done that, dealt in 9 that manner, in that market, at that time, in that size, 10 that's your LIBOR rate. I think that's very clear. We 11 would not need to use any other form of indication.</p> <p>12 Q. Thank you. Can we turn to Barclays in that document, 13 please. I just wanted to touch on paragraph 4:</p> <p>14 "It is the early days yet but the reforms working at 15 the moment. We noted that there is a trend to increase 16 the amount of business off-balance sheet, as opposed to 17 on but there will always be a cash market."</p> <p>18 I want to ask you two things about that. The 19 reference to "business off-balance sheet" is a reference 20 to what?</p> <p>21 A. Well, without a great deal more context, I wouldn't 22 know, but I think one definition -- one interpretation 23 of what Barclays are saying there is that trading cash 24 is on balance sheet, trading derivatives is off-balance sheet.</p>
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<p>1 Q. Mr Chawla makes it clear, and I want to make it clear to      2 you, question 4 may not relate to LIBOR. So if you look      3 at the --</p> <p>4 <b>A. Yes. This is, if I recall, a reference to sterling      5 money market reform.</b></p> <p>6 Q. Thank you. I won't press that. Bank of Canada below      7 that. You can see that for yourself:      8 "US dollar LIBOR is getting very close to the actual      9 funding rate and LIBOR LIBID spread has virtually      10 disappeared."</p> <p>11 What is LIBID?</p> <p>12 <b>A. LIBOR is an offered rate, the rate at which -- let's      13 assume I'm a contributor bank, it's the rate at which      14 money is offered to me. LIBID would be the rate at      15 which I would offer money and LIBID was never -- it was      16 not a formal product. It wasn't something that the BBA      17 created. It was a notional idea that certain people in      18 the market came up with. It's not really something that      19 I could offer a great deal of information around because      20 it wasn't something the BBA ever --</b></p> <p>21 Q. "... getting very close to the actual funding rate ..." Do we read that therefore again as an issue of accuracy, as we have discussed already?</p> <p>22 <b>A. Yes.</b></p> <p>23 Q. So it's implicit it hadn't been accurate, would you</p>	<p>1 constricting quite significantly, hence pricing off      2 derivatives, so on and so forth?</p> <p>3 <b>A. I think it's fair to say that for a long time before the      4 period that we're considering there had been a general      5 decrease in liquidity. I don't know if I could say      6 exactly when it became a big problem, but it was      7 certainly 2006, 2007, yes.</b></p> <p>8 Q. Thank you. If we turn over the page to Bank of Tokyo, please. I want to just reference this for something else, please. 3:</p> <p>11 "The yen money market has not settled down following      12 the increase of rates by the Bank of Japan. Volatility      13 is still very high."</p> <p>14 The Japanese market in 2006 went through quite a significant amount of transformation, didn't it, in terms of interest rates? Do you remember that?</p> <p>17 <b>A. I don't recall it, but from context it seems to say, the      18 first line of 3 "increasing rates by the Bank of Japan",      19 so, yes, let's assume that's the case.</b></p> <p>20 Q. Thank you. Just bear with me for one moment. (Pause) If we turn now, please, to JEX/003. 22 June 2006. The BBA LIBOR steering group, is that a subdivision of the FXMMC or was that the FXMMC in effect?</p> <p>24 <b>A. It was a junior committee and its membership overlapped with the Foreign Exchange and Money Markets Committee</b></p>
<p>Page 37</p> <p>1 agree with that?</p> <p>2 <b>A. There are a number of readings of that. It could be      3 that guy at the Royal Bank of Canada is saying that      4 dollar LIBOR is getting very close to his funding rate,      5 his personal funding rate, which he might regards being      6 a good thing.</b></p> <p>7 Q. Move down the page to West LB, please, over the page. I just want to touch on this for one very brief point because it's an early reference. Paragraph 4. I appreciate it's not LIBOR related, but there is a reference that says: "... led to liquidity drying up slightly." Is that generally in the market or does that relate to the matters that paragraph 4 was addressing?</p> <p>15 <b>A. I'm sorry, could you repeat or rephrase that?</b></p> <p>16 Q. Yes. Where it says: "... led to liquidity drying up slightly." Is that an issue that paragraph 4 was addressing specifically or was that more general observation about the state of the market? I'm going to suggest, Mr Ewan, the market, the cash market, had been for a number of years drying up. Would you agree with that? Maybe that's the easiest way to --</p> <p>24 <b>A. Yes, I would agree with that.</b></p> <p>25 Q. In 2006, where we are, you're beginning to see it</p>	<p>Page 39</p> <p>1 <b>but it wasn't identical.</b></p> <p>2 Q. What was its purpose?</p> <p>3 <b>A. Its purpose was to -- every year we did a review of the      4 contributor banks for LIBOR and that review was based on      5 information submitted by the banks. The steering group      6 would meet in the morning and would read through the      7 review in detail and make preliminary recommendations      8 that would then be taken to the Foreign Exchange and      9 Money Markets Committee, which would typically meet in      10 the afternoon, and they would consider the      11 recommendations from the junior group.</b></p> <p>12 Q. I want to just ask you about paragraph 7 in that note, please, under, "Any other business". The rest is talking about arrangements: "Members requested more information in future on late contributions to the rate setting process, an analysis of which banks are regularly eliminated from the rate setting process. The analysis should also show how far from the eventual rate each contributor is. John Ewan confirmed that Reuters had recently introduced software that can do this and so next year this information will be made available to committee members. Members requested that next year there is an agenda item to review the definition of LIBOR in order to ensure it's still relevant."</p>

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<p>1 I wanted to just refer this, Mr Ewan, to this  2 extent: the information, would you supply in 2006, which  3 is the year we're in, the data from Reuters to this  4 committee that sets out those that have been eliminated  5 from the rate regularly and would that have been the  6 subject of some investigation?</p> <p><b>A. Yes, but let's just think about what being eliminated from the rate means because the LIBOR panel seeks to ensure that the biggest, strongest banks are contributing to LIBOR and that happens via this review process. Now, nevertheless let's look at the dollar panel. There are 16 banks on the dollar panel. One of those is going to be the strongest bank and then there will be a range down to the sixteenth bank which will be the least strong bank. So the strongest bank will be able to borrow at the best rate and then you'll see rates will differ. So if the best bank can borrow at 5 per cent, maybe the next one borrows at 5.01 per cent, 5.02. Now four of those banks are going to get knocked out at the bottom and four are going to get knocked out at the top.</b></p> <p><b>It follows that the best bank gets knocked out every day because they have the ability to borrow at the best rate. So the mere fact that you're being eliminated regularly doesn't mean that there's a problem. It in</b></p>	<p><b>A. Of what precisely?</b></p> <p>Q. Well, do you think it is in March or do you think it's in September? I know it's a difficult question. My learned friend thinks it's September, in which case we'll take that down and come back to it at the appropriate point in time.</p> <p>Can we have JEX/005, please. This is 2007. Again, these are now the notes of your meetings again that we've looked at, so we've done 2005, 2006 and this is now 2007; all right?</p> <p><b>A. Hmm, hmm.</b></p> <p>Q. By this stage were you the lead individual?</p> <p><b>A. I couldn't say for sure. Up until the point when he left the BBA, Alex Merriman was my manager so he was more senior. I can't remember whether these were meetings that I did alone or with Alex. I don't -- I'm afraid I couldn't say.</b></p> <p>Q. I only want to touch on a couple of these. If we turn to -- I think it's Bank of Tokyo which is internal page 6. Would you have taken these notes, even if you were the lead, and would you then have had admin support?</p> <p><b>A. I cannot remember. No, I am sorry, I can't remember.</b></p> <p>Q. Someone -- in any event, you would have been on these meetings?</p>
<p>Page 41</p> <p>1 fact shows that the rate is working properly.  2 Q. The key I really wanted to establish, Mr Ewan -- thank  3 you for your evidence -- was that by 2006 the BBA had  4 introduced some data tools that were effectively  5 analysing where and who were setting what rates?</p> <p><b>A. Yes.</b></p> <p>Q. If there were any irregularities, if there were  8 irregularities, those would be drawn to the attention of  9 whoever, the FXMMC or you in the first instance?</p> <p><b>A. Yes.</b></p> <p>Q. Can we move now, please, to JEX/004. One of the first  12 questions I'm going to ask you, because this may be  13 slightly out of context, Mr Ewan, it's dated  14 9 March 2007 but I want you to look at the content of it  15 and I want to know whether the date has been  16 Americanised?</p> <p><b>A. You mean it's actually 3 September, rather than 9 March?</b></p> <p>Q. Yes. To assist you -- and I'm sure I'll be forgiven for  19 saying -- I don't think any of the other BBA e-mails do  20 that, but I just want you to look at the context of this  21 because we may need to come back to it later  22 chronologically. Does the content assist you, in  23 particular if you look at the penultimate paragraph  24 about a Bloomberg story? Do you have any recollection  25 now?</p>	<p>Page 43</p> <p><b>A. Yes.</b></p> <p>Q. Thank you:</p> <p>"Although for the last 7 or 8 years the Japanese  4 market has been quite static, the last year has seen an  5 increase in both interest rate and market activity.  6 Accordingly, this has increased liquidity which has  7 allowed contributors to give a more accurate LIBOR  8 fixing that is tied closer to the market."</p> <p>Two issues. The first is the economic activity that  10 you have noted, do you remember what that concerned  11 in 2007 for the yen market?</p> <p><b>A. I don't recall, but from context the bank seems to be saying that interest rates have gone up and also market activity has gone up. There is more cash being traded.</b></p> <p>Q. The second is another issue of accuracy, would you  16 agree?</p> <p><b>A. Well, I think the reading I would offer of that is LIBOR is a cash rate. We've already gone over many times what the definition is and it -- LIBORs must be more accurate when they are being set by reference to a liquid cash market, rather than by doing your best to try and arrive at an honest rate by using implied data.</b></p> <p>Q. Someone has noted the following:  24 "... to give a more accurate LIBOR fixing ..."</p> <p><b>A. And qualified it:</b></p>

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<p>1        "... that is tied closer to the market."</p> <p>2    Q. It implies, doesn't it, Mr Ewan, that the LIBOR fixing 3        had not been as accurate?</p> <p>4    A. No, I don't accept that.</p> <p>5    Q. Do you not accept this one because by 2007 you are, if 6        I may suggest, in the front seat? You accepted it 7        for 2005. You accepted it for 2006.</p> <p>8    A. I don't think that's relevant. You have asked me what 9        I interpret this statement to mean and I have offered 10        you what I think it means.</p> <p>11    Q. Can we look at HSBC, which is internal page 7. 12        Jon Wood, who is the person that you were speaking to, 13        he was to become chair of the FXMMC, wasn't he?</p> <p>14    A. Yes.</p> <p>15    Q. After Mr Storey, I think you said?</p> <p>16    A. Correct.</p> <p>17    Q. "Very happy with LIBOR in general in terms of the 18        product and the processes behind it. Happy that all of 19        the contributors seem to be behaving themselves in terms 20        of not quoting excessively high or low."</p> <p>21        Had contributors not been "behaving" themselves?</p> <p>22    A. Well, you have taken me through a number of documents 23        that certainly, with the benefit of more experience and 24        hindsight, indicates that they weren't.</p> <p>25    Q. Well, you had been in your job now for well over</p>	<p>1        "Mentioned that occasionally groups of banks seem to 2        simultaneously quote higher than the actual market 3        resulting an excessively high LIBOR which doesn't 4        accurately represent the market."</p> <p>5        Clearly, I suggest, an issue of accuracy. Would you 6        agree?</p> <p>7    A. Yes.</p> <p>8    Q. What did you do about it? My learned friend asks me to 9        put it in context and I'm happy to do that:</p> <p>10        "Happy with fixing process and its fixings broadly 11        speaking. Mentioned that occasionally a group of banks 12        seem to simultaneously quote higher than the actual 13        market resulting in excessively high LIBOR which doesn't 14        accurately represent market."</p> <p>15        That's my question, Mr Ewan. Clearly an issue of 16        accuracy? You have agreed.</p> <p>17    A. Yes.</p> <p>18    Q. My question: what did you do about it?</p> <p>19    A. I presented this paper to the Foreign Exchange and Money 20        Markets Committee.</p> <p>21    Q. What did they do about it?</p> <p>22    A. I can't remember. I mean, can we just look at it again?</p> <p>23        For a bit of context we have, I think, just looking very 24        roughly here, perhaps 15 or 20 banks all saying they're 25        happy with the process and the way that the rates fix.</p>
<p style="text-align: center;">Page 45</p> <p>1        12 months and I'm assuming – using the vernacular -- 2        you had got your feet under the table; yes?</p> <p>3    A. Yes.</p> <p>4    Q. You understood what your role was?</p> <p>5    A. Yes.</p> <p>6    Q. You understood what your responsibilities were?</p> <p>7    A. Yes.</p> <p>8    Q. Jon Wood was, shall we say, an individual who was to 9        become the chair of the FXMMC, someone that you, as 10        we'll see, would speak to on a regular basis?</p> <p>11    A. That's correct.</p> <p>12    Q. Did you ask him to elaborate on what he meant by 13        "contributors seem to be behaving themselves"? Was any 14        detail put to this?</p> <p>15    A. I can't remember.</p> <p>16    Q. Because it wouldn't be in accordance with the 17        definition, would it?</p> <p>18    A. What, if they were behaving themselves?</p> <p>19    Q. If they were not behaving themselves?</p> <p>20    A. If they were not behaving themselves, it would not be in 21        accordance with the definition.</p> <p>22    Q. It would be ignoring it or not adhering to it, wouldn't 23        it?</p> <p>24    A. It would.</p> <p>25    Q. Abbey, below that, please:</p>	<p style="text-align: center;">Page 47</p> <p>1        Now, it's to the Foreign Exchange and Money Markets 2        Committee's decision as to what to do, but it would 3        appear that most of the users don't have a problem.</p> <p>4    Q. Let's come on to another user in that document, 5        Barclays. Miles Storey, who was to become, I think, the 6        first chair of the FXMMC, is that right?</p> <p>7    A. Yes, that's correct.</p> <p>8    Q. He wasn't chair at this stage, was he, or when did he 9        take his Chairmanship up? We may be able to reference 10        that in another document, Mr Ewan.</p> <p>11    A. I am sorry, I can't remember.</p> <p>12    Q. "Miles was happy with the process in the BBA LIBOR 13        fixings. Looking from a position with vast experience 14        of dealing with LIBOR, Miles commented that it is 15        currently at its peak performance. Although it isn't 16        perfect, it's probably running as near to perfect as it 17        will reach. The rumblings from other banks regarding 18        Barclays' manipulation of the rates seems to have now 19        subsided. Miles mentioned that it was not be feasible 20        for Barclays to be involved in a conspiracy with 21        a number of other banks that would be required in order 22        to manipulate the rates with the currencies that have 16 23        contributors."</p> <p>24        What was that a reference to?</p> <p>25    A. I don't recall what the specific -- what, if any, there</p>

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<p>1       <b>was a specific reference to there.</b></p> <p>2     Q. Over the page, please, Credit Suisse. The context, to 3     put it accurately:</p> <p>4       "LIBOR is currently the best it has ever been in 5     terms of process efficiency and accuracy. Euro LIBOR 6     fully represents the market. Whereas the US dollar and 7     GB pound tend to be around 3 to 4 basis points or ticks 8     over, everyone active in the market expects and 9     understands this. That still doesn't provide an 10    acceptable explanation of why this is."</p> <p>11    I want to go down -- let's read it in total:</p> <p>12    "There is an issue with trading volumes. Euro is 13    most accurate and the markets are very liquid. The 14    dollar and pound are liquid but not to such an extent so 15    it's hard to provide an offered rate in those 16    currencies. It was implied that it is in the interests 17    of most of the contributors to set there contributed 18    rates at a few points higher. This is because it makes 19    their loan book a bit more profitable."</p> <p>20    Two issues. Setting your contributed rates a few 21    points higher would not be in accordance with 22    definition, would it?</p> <p>23    <b>A. No.</b></p> <p>24    Q. "Loan book more profitable" is a reference to what?</p> <p>25    <b>A. Well, the loan book is the sum total of all of the</b></p>	<p>1       <b>makes it completely clear who should be submitting, what</b> 2       <b>their role should be and how they should go about doing</b> 3       <b>that.</b></p> <p>4     Q. Pause there, Mr Ewan. My last question before I ask his 5     Lordship for an adjournment. You knew throughout, 6     despite the clarity that you have just mentioned, that 7     submitters were also traders?</p> <p>8     <b>A. Well, hold on, trading what?</b></p> <p>9     Q. Well, submitting wasn't their only role within the bank, 10    was it?</p> <p>11    <b>A. No, that's correct. The banks didn't have a person</b> 12    <b>whose only job was at 11 o'clock in the morning to put</b> 13    <b>in LIBORs every day.</b></p> <p>14    Q. No. So they would be doing income generation in other 15    areas for the bank?</p> <p>16    <b>A. What do you mean by "other areas"?</b></p> <p>17    Q. Trading, working on the cash desk, trading cash 18    necessarily sometimes.</p> <p>19    <b>A. Well --</b></p> <p>20    Q. It doesn't really matter, but they would be trading, 21    generating an income for the bank?</p> <p>22    <b>A. Our view was that, yes, the point of a bank treasury</b> 23    <b>function is to borrow and lend money. The guys that are</b> 24    <b>borrowing and lending the money must be the people who</b> 25    <b>clearly know what the cost of funds to the bank are.</b></p>
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<p>1       <b>lending that the bank is carrying out.</b></p> <p>2     Q. In other words, are the banks suggesting to you that 3     their LIBORs are being used for commercial purposes?</p> <p>4     <b>A. Yes.</b></p> <p>5     Q. I just want to touch on another issue towards the bottom 6     of the note:</p> <p>7       "A point was raised regarding who it is at the 8     contributor banks that actually inputs the rates.</p> <p>9       "Issues of currency expertise and how junior or 10    senior the person is.</p> <p>11       "It is vital that the role of contributor is taken 12    very seriously."</p> <p>13       What do those three bullet points mean?</p> <p>14     <b>A. Well, it looks like, and I don't recall this</b> 15     <b>conversation, but it looks like Credit Suisse are asking</b> 16     <b>for clarification about who should input the rates, how</b> 17     <b>much expertise they should have, how senior they are and</b> 18     <b>stating that it is important that contributors take</b> 19     <b>their role seriously.</b></p> <p>20     Q. Was there some discussion about conflicts between 21     submitters and traders?</p> <p>22     <b>A. There may have been, I cannot recall, but this looks</b> 23     <b>like it's the -- perhaps the first -- the genesis of the</b> 24     <b>BBA's actions later, when the BBA -- the Foreign</b> 25     <b>Exchange and Money Market Committee, rather, actually</b></p>	<p>1       <b>Therefore, they are the best person to be submitting</b> 2       <b>LIBOR, or their manager is or whatever, but it shouldn't</b> 3       <b>be somebody trading derivatives.</b></p> <p>4     MR HAWES: We'll come back to that after, subject to your 5     Lordship, a short adjournment.</p> <p>6     MR JUSTICE COOKE: Yes. Ten minutes, please, members of the 7     jury.</p> <p>8     (11.48 am)</p> <p>9       (Short break)</p> <p>10    (12.05 pm)</p> <p>11    MR HAWES: Mr Ewan, we'll just finish off that document that 12    we had open. Can we have internal page 10, please, 13    JP Morgan. Very quick reference, just that top line: 14       "BBA LIBOR seems to be running smoothly without any 15    signs of manipulation."</p> <p>16       It's implicit, Mr Ewan, isn't it, that therefore 17    there's an acceptance that there could have been 18    manipulation?</p> <p>19     <b>A. Are you -- is the question about theory or practice?</b></p> <p>20     Q. Practice. We have looked at 2005. We have looked 21    at 2006. Reference to earlier manipulation: 22       "BBA LIBOR seems to be running smoothly without any 23    signs of manipulation."</p> <p>24       It's a strange thing to note, if it's not practice, 25    isn't it?</p>
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<p>1     <b>A. I can only take that on its face value. It says:</b>  2         "BBA LIBOR seems to be running smoothly and it's not  3         being manipulated."</p> <p>4     Q. Over the page, internal page 11, please. Lloyds, very  5         quickly:  6         "LIBOR running to satisfaction with a lower level of  7         complaints and rumblings than there previously was."  8         Complaints and rumblings, do you remember what those  9         concerned?</p> <p>10    <b>A. No, I can't.</b></p> <p>11    Q. Did they concern accuracy?</p> <p>12    <b>A. Possibly.</b></p> <p>13    Q. Did they concern manipulation?</p> <p>14    <b>A. I don't know.</b></p> <p>15    Q. Over the page, please, internal page 12, Royal Bank of  16         Scotland. Towards the bottom there:  17         "We also see no changes in the dollar LIBOR due to  18         market laziness. Rate setters are comfortable with the  19         current levels. Rate setters are obviously setting to  20         suit their underlying positions to some extent. If  21         they're long, they will set below. If they're being  22         aggressive, they will set above."  23         "Underlying positions", what does that mean?</p> <p>24    <b>A. That would appear to be a reference to what we discussed  25         before as being the shape of their book, whether they</b></p>	<p>1         so the Foreign Exchange and Money Markets Committee or  2         perhaps the BBA in the name of the Foreign Exchange and  3         Money Markets Committee wrote to all of the contributor  4         banks and said, "Will you please contribute accurately  5         according to the definition. Here's the definition".  6         Later that year the chief executive of the BBA  7         convened a meeting of all of the panel banks and asked  8         them to contribute accurately. I think around then, or  9         perhaps slightly later, the chief executive of the BBA  10         wrote to the chief executive officers of all of the  11         contributing banks and said, "Here is the definition.  12         Please contribute accurately. It will be damaging if  13         that's not happening".  14    Q. Well, we'll come on to that chronology because there's  15         documents around that time and I accept what you say  16         that those events took place. I'm not saying they  17         didn't.  18    <b>A. Hmm, hmm.</b>  19    Q. I am trying to understand and help the jury understand  20         that, whilst those events took place, other events were  21         also taking place and the BBA were being told about  22         those events; all right? That's what I want to question  23         you about. Do you understand?  24    <b>A. Yes.</b>  25    Q. I mean, would you agree -- let's deal with it in one</p>
<p style="text-align: center;">Page 53</p>	<p style="text-align: center;">Page 55</p>

<p>1         <b>are long or short.</b>  2    Q. So you're being told that they're setting it  3         commercially for their profit?  4    <b>A. Well --</b>  5    Q. Well you are, aren't you, Mr Ewan?  6    <b>A. The thing is it goes on to say:</b>  7         <b>"It would not be feasible for banks to manipulate,  8         The process is transparent and if someone was  9         continually manipulating the rate, we would see a lot of  10         protests."</b>  11   Q. Yes. I'm asking you about the top section first. Are  12         they telling you that they're setting their LIBORs  13         commercially?  14   <b>A. To some extent, yes.</b>  15   Q. To what extent?  16   <b>A. Well, no, to some extent is they are being set  17         commercially to some extent is what we're being told --  18         I am being told.</b>  19   Q. Is that in accordance with the definition?  20   <b>A. No.</b>  21   Q. What, if anything, did the FXMMC do about that?  22   <b>A. Well, in -- where are we? We're in June 2007.  23         Throughout 2007, the later part of 2007, I think if we  24         were to look at the documents we would find there were  25         more concerns raised about the accuracy of the rates and</b></p>	<p>1         fell swoop -- the only governance at this stage that the  2         BBA and the FXMMC had was twofold: you could tell off  3         a panel bank about their contributions if you thought  4         that they were not correct?  5    <b>A. Yes.</b>  6    Q. And you could take them off the panel?  7    <b>A. Correct.</b>  8    Q. There was no other form of discipline at all?  9    <b>A. Not that we could think of.</b>  10   Q. Well, there was no other form of discipline at all?  11         There was none provided for within the terms of  12         reference, was there?  13   <b>A. I think that's what I'm saying. We couldn't come up  14         with anything else that we could do.</b>  15   Q. In that period of time were any panel banks removed due  16         to inaccurate submissions?  17   <b>A. No.</b>  18   Q. Were any panel banks removed at all between 2006 to 2010  19         for the purposes of discipline?  20   <b>A. No.</b>  21   Q. I wonder if we can move, please, to JEX/006, please. If  22         we go to the very bottom of that e-mail, please. I just  23         want you to see, Mr Ewan, so you have a reference --  24         I know you have it in front of you but the chain starts  25         at the bottom; okay?</p>
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<p>1   <b>A. We're looking at e-mails on --</b></p> <p>2   Q. 26 September at 9.42.</p> <p>3   <b>A. Yes, got you.</b></p> <p>4   Q. Do you have it?</p> <p>5   <b>A. Yes.</b></p> <p>6   Q. The jury saw on Monday, I think, either through you or 7       Ms Scutt, the FT article. I'm not going to show it to 8       you. The jury have seen it. You're aware of it, aren't 9       you?</p> <p>10   <b>A. Yes.</b></p> <p>11   Q. This is an e-mail chain that starts as a result of that 12      so you're e-mailing. Who are the individuals there? 13      Are they the members of the FXMMC?</p> <p>14   <b>A. Yes.</b></p> <p>15   Q. "All, we intend to produce a rebuttal of this unhelpful 16      article. We weren't offered any opportunity to comment 17      ahead of publication, although on the bright side it's 18      nice to finally see the FT acknowledge that the product 19      is BBA LIBOR, rather than some random rate that 20      magically appears in the market."</p> <p>21      I only draw your attention to that because that's 22      how this e-mail chain starts; all right?</p> <p>23   <b>A. Hmm, hmm.</b></p> <p>24   Q. I would like you to scroll up, please, to the e-mail 25      from Mr Thomasson, back to you at 12.16 that day. He</p>	<p>1       contact the banks you mentioned and ask them for their 2       reasoning as to why they contributed as they did. 3       I don't believe the credibility of the fix should be 4       damaged. We top and tail the data as part of the rate 5       fixing process for exactly circumstances like these. As 6       an illustration of this, if each of the three lowest 7       quoting banks today have quoted the same rate as RBS, 8       the effect on the fixing would have been less than 9       1 basis point."</p> <p>10      Now, I read those both together, Mr Ewan, so you 11      have the proper context. Mr Thomasson is giving you 12      information that he's asking you to investigate, would 13      you agree?</p> <p>14   <b>A. Yes.</b></p> <p>15   Q. As a result of your e-mail, you say that you're going to 16      contact the banks and make those enquiries. Did you?</p> <p>17   <b>A. I can't remember, but I see no reason why I would not 18      have done. I state an intention.</b></p> <p>19   Q. Where would you have noted those enquiries?</p> <p>20   <b>A. Probably in my handwritten notebook.</b></p> <p>21   Q. You would have made a note at the time of the enquiries 22      that you had made?</p> <p>23   <b>A. I can't say I did that with every enquiry, but it was 24      certainly my habit to do so I had an aide memoire so 25      I could take it to the Foreign Exchange and Money</b></p>
<p style="text-align: center;">Page 57</p> <p>1       was working obviously for RBS and he was a member of the 2       FXMMC?</p> <p>3   <b>A. I can't remember if he was at the time. I think -- no, 4       I couldn't say for sure, but I'm certain that he had 5       involvement with the committee. He was aware of the 6       committee and he worked -- if he wasn't RBS's member, he 7       worked with for the BS's member in his office.</b></p> <p>8   Q. Thank you. He write:</p> <p>9       "John, with reference to yesterday's FT article and 10      subsequent comment, I think you need to investigate some 11      of the US dollar three month LIBOR fixings submitted 12      today. Three month dates now maturing in two hours of 13      the date. One would expect the rate to have firmed to 14      take account of the year-end turn. Most contributors 15      accordingly fixed higher than yesterday with three 16      notable exceptions. These fixings do not reflect 17      activity in the cash market and do little to enhance the 18      credibility of the London fix.</p> <p>19       "Regards, Mark."</p> <p>20      Can we scroll up. Your response:</p> <p>21       "Mark, I had a look at the underlying data and 22      I agree that there is certainly a wider spread than one 23      would normally expect to see in normal market 24      conditions, although a 12 basis point spread between 25      contributors has been common lately. I will however</p>	<p style="text-align: center;">Page 59</p> <p>1       <b>Markets Committee.</b></p> <p>2   Q. I was going to ask you about that. So was there ever 3       a filter process by you about what you would or wouldn't 4       take to the FX Committee?</p> <p>5   <b>A. Yes.</b></p> <p>6   Q. What would make it to the FX Committee?</p> <p>7   <b>A. If I asked a bank, "Why did you do this?" and they gave 8       me an explanation that I found unconvincing, I would 9       then take it to the Foreign Exchange and Money Markets 10      Committee or at least call the Chairman and say, "Look, 11      this bank's told me this. Does that sound fair to you?"</b></p> <p>12   Q. So there would be a record somewhere of your 13      communication, firstly, to the banks concerned here?</p> <p>14   <b>A. There would be, yes.</b></p> <p>15   Q. And you think it would be in your notebook?</p> <p>16   <b>A. I think so. If not, I believe, and I can't say this for 17       sure, but I believe that all of the people that I spoke 18       to were on taped lines so there should be records at the 19       bank of the conversations.</b></p> <p>20   Q. To what degree would the FX Committee note, in the sense 21      of record in the minutes, these kind of enquiries that 22      you would undertake? I'm going to suggest they don't.</p> <p>23   <b>A. I think they do if they are of concern and if they're 24       not of concern, I don't think they did.</b></p> <p>25   Q. All right. Can we please on the same sort of vein then</p>

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<p>1 look at JEX/007. This is an agenda for 2 August for the  2 BBA's meeting with the Bank of England. Paragraph 2  3 concerns BBA LIBOR:  4 "Business continuity agreement."  5 We're not worried about that:  6 "Panel review and feedback on LIBOR and markets  7 (BBA)."  8 My first question is: would there have been notes  9 for this meeting? Would there have been minutes?  10 <b>A. I can't speak for what the bank might have done.</b>  11 <b>I don't recall whether these were minuted meetings.</b>  12 Q. Would you have taken a note of the meeting?  13 <b>A. Not unless I was asked to.</b>  14 Q. You wouldn't have taken a personal note, not a formal  15 record, but would you have taken a personal aide memoire  16 of the meeting?  17 <b>A. If there were actions for me to -- things that I needed</b>  18 <b>to do, yes.</b>  19 Q. I don't think we have minutes, you see. That's why I'm  20 asking you the questions. We have the agenda but  21 I haven't seen minutes.  22 <b>A. From what I recall of these meetings, some of which</b>  23 <b>I attended and some of which I didn't, I believe they</b>  24 <b>were at the request of the Bank of England and they</b>  25 <b>would ask us, the BBA, to provide information about</b></p>	<p>1 Q. When everything changed?  2 <b>A. Yes.</b>  3 Q. Can we have, please, JEX/008, please. You have just  4 referred to lines that were recorded, Mr Ewan?  5 <b>A. Yes.</b>  6 Q. This is you speaking to Clive Jones, who clearly is  7 identified he's at Lloyds. Who was he?  8 <b>A. He was Lloyds -- he was a member of the Foreign Exchange</b>  9 <b>and Money Markets Committee and his day job was, as far</b>  10 <b>as I recall, he worked in some capacity in the treasury.</b>  11 Q. Was he a submitter himself?  12 <b>A. I couldn't tell you whether he was the person that</b>  13 <b>actually punched the numbers in, but I believe he was</b>  14 <b>the person responsible -- when we formulated the</b>  15 <b>requirement to have a named individual to be</b>  16 <b>responsible, I think it was him.</b>  17 Q. All right. Let's look at transcript together. He said:  18 "Lloyds."  19 You say:  20 "Hi Clive, it's John Ewan at the BBA."  21 I'm going to cut out some of the "rights" and  22 "okay". You can follow that, Mr Ewan, on the page.  23 You:  24 "I've just spoken to a few people on the committee.  25 Their view is that you really although the definition</p>
<p style="text-align: center;">Page 61</p> <p>1 topics that they were interested in -- the bank was  2 interested in.  3 Q. They, the bank, were clearly interested in feedback on  4 LIBOR?  5 <b>A. Yes.</b>  6 Q. Would you have reflected the matters that we have looked  7 at in our notes, your notes, about the concerns that had  8 been expressed as to the accuracy of the rates?  9 <b>A. I cannot remember what was said at that meeting, but we</b>  10 <b>would have no reason at all not to be open with the Bank</b>  11 <b>of England and, you know, as we will doubtless get to,</b>  12 <b>it can be seen that the BBA specifically and me in</b>  13 <b>person spent an awful lot of time trying to get the bank</b>  14 <b>to take more of an interest and be more formally engaged</b>  15 <b>with LIBOR.</b>  16 Q. And they, I think, were reticence to be publicly  17 acknowledged with LIBOR?  18 <b>A. Correct.</b>  19 Q. Whilst we touch on this subject, the financial services,  20 the FSA, to become the FCA, were equally of that view,  21 they didn't want to be publicly associated with LIBOR?  22 <b>A. Yes.</b>  23 Q. And they declined to regulate it?  24 <b>A. Yes, until April or whenever it was, until 2013, when</b>  25 <b>they finally did.</b></p>	<p style="text-align: center;">Page 63</p> <p>1 says it's got to be what you can get in good size,  2 really the underlying thing is what LIBOR's just trying  3 to reflect is how do you fund yourself so it's the level  4 that you've got to set yourself at to fund yourself.  5 However, you're going to do that. Whether that's what  6 you can issue paper at or how you're doing it off the  7 dollar arbitrage, does that help?  8 "No. Well, this is just normal I would say. The  9 point is there isn't any there."  10 Just pause. We'll come through this. This is  11 a reference, isn't it, to the lack of liquidity in the  12 market, Mr Ewan?  13 <b>A. I think "there isn't anything there" is exactly</b>  14 <b>a reference to there being --</b>  15 Q. We'll read on. He then continues:  16 "So as high as -- it could be as high as whether it  17 needs to entice out an offer then or a bid for the  18 paper.  19 "Yes, I guess so, but I think one of the things  20 about LIBOR is it is always a ref -- it's a distilled  21 reflection of an individual bank's view though so  22 I guess like different banks will have different views  23 and different ways of dealing with it at the moment."  24 "Dealing with it" is, I suggest, the definition and  25 setting of the LIBOR, would you agree?</p>

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<p>1 A. I'm sorry, could you repeat that?</p> <p>2 Q. "Dealing with it" is in relation to the setting of the</p> <p>3 LIBOR?</p> <p>4 A. Yes.</p> <p>5 Q. He continues:</p> <p>6 "Yes, don't get me wrong really, we'll probably put</p> <p>7 something in about 5 or 10 points higher than yesterday</p> <p>8 but realistically that's not real. If you get</p> <p>9 challenged on that, you can't tell -- well, that's where</p> <p>10 that bank can raise money because we couldn't.</p> <p>11 "Right.</p> <p>12 "So I just -- that's the thing. So I just thought</p> <p>13 because I just give you a call and let you know that</p> <p>14 because, to be fair, lots of guys, you might get</p> <p>15 questions about it later on. That's all.</p> <p>16 "Yes.</p> <p>17 "Do you see what I mean?</p> <p>18 "Yes, I see exactly what you mean."</p> <p>19 Pausing there and we'll carry on down in a moment.</p> <p>20 He's just told you that the rate coming in that he's</p> <p>21 likely to post is not real. How is that in accordance</p> <p>22 with the definition?</p> <p>23 A. I think what Clive -- right, so the definition says the</p> <p>24 rate at which you could borrow money and Clive is saying</p> <p>25 there is no money to be borrowed. Therefore, it can't</p>	<p>1 a bad way. There must be a LIBOR rate. It must get</p> <p>2 posted every day".</p> <p>3 Q. So there was, if I may suggest -- you may disagree, and</p> <p>4 I want you to understand it's a suggestion -- over this</p> <p>5 period of time artificiality to the rate?</p> <p>6 A. It depends on how you are defining "artificiality". If</p> <p>7 you mean banks were posting a rate for cash that simply</p> <p>8 was not there, did not exist, then, yes, the rates were</p> <p>9 artificial, but the view of the Foreign Exchange and</p> <p>10 Money Markets Committee and every single other person in</p> <p>11 the market was the fact that the definition says if you</p> <p>12 were to borrow, not where have you borrowed, and it</p> <p>13 would be very difficult to describe in these</p> <p>14 circumstances what is an accurate rate because there's</p> <p>15 no way of grounding it. Somebody could say -- it would</p> <p>16 be perfectly possible for the rate to be 7 per cent,</p> <p>17 let's say, and one person could say, "Rubbish, it's 20"</p> <p>18 and somebody could say, "No, it's 3" and both of those</p> <p>19 people would say that the rate is wrong. Neither of</p> <p>20 them would be able to actually prove that because the</p> <p>21 thing that you're trying to measure isn't there.</p> <p>22 Q. Thank you. It continues, if we return to it, he says:</p> <p>23 "We can issue paper at certain levels but that's</p> <p>24 extremely high so perhaps that's where LIBOR's got to be</p> <p>25 but it would be -- if people are there, it's the</p>
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<p>1 Q. Thank you. Let's go, please, to the next document. I'm      2 going to jump one, my Lord, so JEX/010, please. If we      3 go to the e-mail at 9.44 on 16 August, please. Can we      4 stop there. Mr Ewan, this is from you and I take it      5 this is again to the FX Committee.</p> <p>6 A. Yes.</p> <p>7 Q. "Given the ongoing problems with the interbank      8 market ..."</p> <p>9 This is, as we've just looked at, August 2007 and      10 liquidity, as I suggest, had really dried up by then.      11 Would you agree?</p> <p>12 A. Yes.</p> <p>13 Q. "Given the ongoing problems with the interbank market,      14 I would like to have an ad hoc meeting of this committee      15 to discuss the impact that this has on the LIBOR rates.      16 Specifically (i) the definition of LIBOR states the      17 panel banks must contribute 'the rate at which it could      18 borrow funds, were it to do so, by asking for and then      19 accepting interbank offers'. In that I understand that      20 currently there is no London interbank market, certainly      21 in the short dates. Do we need to clarify the      22 definition?"</p> <p>23 This touches on the evidence you gave to my learned      24 friend and the evidence in fact you have given today,      25 which is tension being brought on the definition due to</p>	<p>1 Did ask you them, "Is this going on?"?</p> <p>2 A. Well, in a way, but the manner in which I did so was to      3 say, "What do we need to do to ensure that the rates are      4 accurate?"</p> <p>5 Q. I wonder if we can then turn, please, to JEX/011.      6 I want to just show you this. It's not your document,      7 Mr Ewan, but I think you have seen some of these      8 documents before. They originate from the Bank of      9 England. You were shown some Bank of England documents,      10 is that right?</p> <p>11 A. I'll accept that, yes.</p> <p>12 Q. Landesbank is a bank that works in London; yes?</p> <p>13 A. I don't know. I've never -- I don't believe I've ever      14 dealt with them. I couldn't tell you anything about      15 them.</p> <p>16 Q. One of the questions I was going to ask you is: are they      17 one of your members?</p> <p>18 A. Well, I don't know whether they were a member of the      19 BBA.</p> <p>20 Q. My purpose for showing you this is to set the context of      21 what was taking place in August of 2007; all right?</p> <p>22 A. Yes.</p> <p>23 Q. "Sterling still difficult, although the short end has      24 eased a little. Still few offers out past one month.      25 Euro short dates are slightly more liquid. Finds it</p>
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<p>1 the lack of liquidity. Do you agree?</p> <p>2 A. Yes.</p> <p>3 Q. Thank you. (ii):</p> <p>4 "How best to defend ourselves against potential      5 accusations that the current rates are not a genuine      6 reflection of the market."</p> <p>7 Two things. Did you think they were not a genuine      8 reflection of the market at that stage?</p> <p>9 A. I didn't know.</p> <p>10 Q. You were sufficiently concerned to write what you have,      11 which speaks for itself. In fairness to you it says      12 "potential accusations", but I want to ask you was there      13 a concern at that stage -- I suggest there clearly must      14 have been -- on your part for you to have written that?</p> <p>15 A. I was clearly concerned and I think there are -- you're      16 touching on a number of issues there. I would not be in      17 a position to know absolutely whether the rates were      18 accurate because, for a start, as I've just said,      19 I understood that there wasn't an interbank market so      20 it's very difficult to measure something that isn't      21 there and also I wasn't in the unique position of having      22 perfect market knowledge. So how could I know?</p> <p>23 Q. Well, I suppose on the second point, Mr Ewan, had you      24 asked the FX members about some of these concerns? They      25 reflected the markets, that's what they were there for.</p>	<p>1 strange that CBs have been more proactive in leading and      2 reassuring the market."</p> <p>3 CBs being, I suggest, Central Banks?</p> <p>4 A. Yes.</p> <p>5 Q. "The Fed discount rate cut has helped the market      6 psychologically and was acute move to extend out to      7 30 days but questionable as long-term solution. BoE      8 [Bank of England] did little to calm the market. The      9 majority of their assets are LIBOR based and so the      10 volatile fixings have been causing them a few problems.      11 They continue to finance in sterling and euro on an      12 overnight basis. See little point in locking in losses      13 on term funds, especially given the overnight      14 volatility. Concerned at what might develop should      15 liquidity in the short dates dry up. They have noticed      16 the significant amount of discrimination based upon      17 names, including towards them at Landesbank, and also      18 believe that they may be manipulating LIBOR and SONIA      19 fixings, though wasn't forthcoming with any names."</p> <p>20 That bank, in August 2007, is suggesting to the Bank      21 of England that there is manipulation potentially in the      22 market. Were you getting that kind of information from      23 your members in 2007 at this stage?</p> <p>24 A. I don't recall whether there was specific allegations of      25 manipulation. I remember that there was increasing</p>
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<p>1      <b>concern about the accuracy of LIBOR.</b></p> <p>2    Q. The second issue that I wanted to touch on that this</p> <p>3    document demonstrates was there was a shift in the</p> <p>4    creditworthiness of the panel banks. Would you agree</p> <p>5    with that? So good names may be at the top of the LIBOR</p> <p>6    postings or would be at the bottom of the postings and</p> <p>7    the less creditworthy banks would be at the top?</p> <p>8    A. <b>Well, that had always been the case, but it grew --</b></p> <p>9      <b>I certainly recall it grew much more profound as an</b></p> <p>10     <b>effect.</b></p> <p>11    Q. So did you see a widening of submissions between the</p> <p>12    top, whether outliers or otherwise, and the bottom?</p> <p>13    A. <b>Yes, we did.</b></p> <p>14    Q. And quite a significant widening?</p> <p>15    A. <b>Yes.</b></p> <p>16    Q. Was that in all currencies or was that particularly in</p> <p>17    certain currencies only?</p> <p>18    A. <b>I believe it was in all currencies.</b></p> <p>19    Q. Thank you. Can we turn, please, to JEX/012. They were</p> <p>20    a panel bank, Deutsche, is that right?</p> <p>21    A. <b>I am sorry, I'm trying to catch up to where you are.</b></p> <p>22    Q. Sorry. It should be your next document in your bundle.</p> <p>23    A. <b>My next document is what looks like a Bank of England</b></p> <p>24     <b>note of a meeting.</b></p> <p>25    Q. Let's look at this on the screen for one moment and</p>	<p>1      meeting. Do you remember it?</p> <p>2    A. <b>I don't.</b></p> <p>3    Q. It's a meeting with the BBA, 29 August 2007, to discuss</p> <p>4    the fixings. I wonder if we can just scroll down,</p> <p>5    please:</p> <p>6      "BBA agreed with our assessment of the LIBOR premium</p> <p>7    as part credit. Uncertainty about bank credit risks</p> <p>8    which is common across all currencies and part liquidity</p> <p>9    varying across currencies. AO different perceptions of</p> <p>10    Central Bank stance."</p> <p>11    Do you know what AO means?</p> <p>12    A. <b>I don't, but I would hazard a guess at "on account".</b></p> <p>13    Q. "Mr Ewan noted that in his dialogue with the commercial</p> <p>14    banks he had not heard of any grumblings in the market</p> <p>15    in regard to the BoE's policy stance."</p> <p>16    Is that a reference to the injection of liquidity at</p> <p>17    that stage?</p> <p>18    A. <b>Probably, but I wouldn't want to be certain.</b></p> <p>19    Q. "By contrast, he thought the ECB's policy, whilst</p> <p>20    helping liquidity, has not improved sentiment. He</p> <p>21    questioned if the provision of liquidity sent a message</p> <p>22    to the market that there was a problem. Two weeks ago</p> <p>23    the BBA held a conference call with the FEMMC, the</p> <p>24    Foreign Exchange Money Markets Committee ..."</p> <p>25    Pause there. Should that be the FXMMC?</p>
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<p>1 A. No.</p> <p>2 Q. "Together these trigger automatically. Plausibility</p> <p>3 checks with Reuters will then have to confirm with the</p> <p>4 panel banks and is hence time-consuming."</p> <p>5 What is that a reference to, the automatic</p> <p>6 plausibility check?</p> <p>7 A. I think this is a reference to checks that Reuters have</p> <p>8 in place at the behest of the Foreign Exchange and Money</p> <p>9 Markets Committee that mean that if a bank submits</p> <p>10 a rate that is significantly different one day to the</p> <p>11 next, it triggers a call whereby Reuters would ring the</p> <p>12 bank and say, "Could you confirm your rate to me".</p> <p>13 Q. So if a bank is an outlier at the bottom one day and</p> <p>14 then suddenly either goes to become an outlier at the</p> <p>15 top the next day, that would provoke a call?</p> <p>16 A. Yes.</p> <p>17 Q. If a bank was an outlier at the bottom and produced or</p> <p>18 came into the pack but towards the top, that would</p> <p>19 produce a call?</p> <p>20 A. It might, yes.</p> <p>21 Q. There would be some presumably enquiry about the</p> <p>22 movement of the rate, as you have just described?</p> <p>23 A. Yes.</p> <p>24 Q. And, I'm assuming, evidence might be required for why</p> <p>25 the rate had moved in the way in which it had?</p>	<p>1 do?</p> <p>2 A. It might do, yes.</p> <p>3 Q. "As an example they said that a bank should not</p> <p>4 oscillate between the top and the bottom of the panel's</p> <p>5 range, unless they have a change in credit status.</p> <p>6 Whilst the BBA admitted that fixings are only valid if</p> <p>7 the panel bank are honest in their quotes, analysis</p> <p>8 would be retrospective and punishment would be the 'slap</p> <p>9 on the wrist' variety. Mr Ewan noted that there should</p> <p>10 not be a significant difference between Euro LIBOR and</p> <p>11 EURIBOR fixings, aside from panel composition and timing</p> <p>12 effects. He also noted that the banks should not</p> <p>13 necessarily be posting the same rate for Euro LIBOR as</p> <p>14 for EURIBOR, though this was very difficult to prove."</p> <p>15 Pausing there. Forgive me if I've misunderstood</p> <p>16 your evidence this morning. I think you said they could</p> <p>17 quote the same?</p> <p>18 A. Well, there's no explicit prohibitions for doing that</p> <p>19 so, yes, they can.</p> <p>20 Q. The note continues:</p> <p>21 "He noted that BBA rates had to be formed in London</p> <p>22 whereas this was not the case for EURIBOR rates and</p> <p>23 hence would account for very small differences in rates.</p> <p>24 However, it's equally true that both could quote could</p> <p>25 come from the same source. We asked the BBA if there</p>
<p style="text-align: center;">Page 77</p> <p>1 A. Yes.</p> <p>2 Q. If the evidence was satisfactory, would that have been</p> <p>3 drawn to the attention of the FXMMC committee or not?</p> <p>4 A. It may have been. I wouldn't like to say that in all</p> <p>5 cases it was or in all cases it wasn't.</p> <p>6 Q. Back to paragraph 5:</p> <p>7 "The BBA do check that the panel are honest and that</p> <p>8 they are not 'quoting their book. One of their</p> <p>9 techniques ..."</p> <p>10 Does that mean your techniques?</p> <p>11 A. Well, they would be techniques that would be recommended</p> <p>12 by the Foreign Exchange and Money Markets Committee,</p> <p>13 given to us that we would then ask Reuters to do or</p> <p>14 possibly they might have been done internally within the</p> <p>15 BBA.</p> <p>16 Q. Thank you:</p> <p>17 "One of their techniques was to make sure the higher</p> <p>18 rated banks were quoting rates that were below lower</p> <p>19 rated banks. Note that recently this has not been the</p> <p>20 case."</p> <p>21 Pausing there. That is a reference to</p> <p>22 creditworthiness of banks, is it?</p> <p>23 A. Yes.</p> <p>24 Q. So, in other words, if an AAA bank is quoting higher</p> <p>25 than an AA bank, that would trigger an enquiry or might</p>	<p style="text-align: center;">Page 79</p> <p>1 were any lessons to be learnt in regard to how the</p> <p>2 fixings were designed. They defended the current from</p> <p>3 by reference to its simplicity and its long time series</p> <p>4 which would be broken if the fix was redefined. The BBA</p> <p>5 had not had much contact with users of LIBOR,</p> <p>6 eg corporates and derivatives traders, in regard to the</p> <p>7 impact of higher fixings."</p> <p>8 Is paragraph 8 accurate?</p> <p>9 A. Well, it depends what -- I don't know what Jerry Jones,</p> <p>10 who appears to be the author of this, would regard as</p> <p>11 being "much" so I couldn't state outright. I record</p> <p>12 speaking to corporates. I can't remember whether it was</p> <p>13 at or around August 2007 and I don't know is the answer.</p> <p>14 Q. We move, please, then -- thank you -- to JEX/014.</p> <p>15 I wonder if we could just go to the e-mail at 8.33.</p> <p>16 Just to assuage your concern, Mr Ewan, you're in this</p> <p>17 further up. You will see this on the page. So this is</p> <p>18 an e-mail that you have received it's from</p> <p>19 Boris Siegers. Who was he, do you know him?</p> <p>20 A. No.</p> <p>21 Q. "Yesterday I recognised a huge difference between the</p> <p>22 fixed one month US dollar at 5.665 and interbank rates</p> <p>23 provided by brokers of 5.85. Only Barclays quoted real</p> <p>24 market rates. Would you be so kind to investigate it as</p> <p>25 most contributors' quotes are not in line with your true</p>

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<p>1 LIBOR definition."</p> <p>2 If we look up the page, you respond to him at 10.32</p> <p>3 on 4 September:</p> <p>4 "I recognise your concerns. We have convened</p> <p>5 a meeting of the independent Foreign Exchange and Money</p> <p>6 Markets Committee which oversees LIBOR tomorrow and I'll</p> <p>7 raise these points with them."</p> <p>8 Did you?</p> <p>9 <b>A. I don't recall whether I raised that specific concern</b></p> <p>10 <b>from Mr Siegers, but I do recall around this time, the</b></p> <p>11 <b>summer/autumn of 2007, having many conversations with</b></p> <p>12 <b>the committee that were centred around non-LIBOR</b></p> <p>13 <b>contributing banks saying, "These rates are</b></p> <p>14 <b>unrealistically low".</b></p> <p>15 Q. It wasn't just non-panel banks, was it, Mr Ewan, as</p> <p>16 we'll come on to; panel banks were also telling you at</p> <p>17 that stage, and this is low-ballng I suggest?</p> <p>18 <b>A. Not necessarily. When I -- the reason that -- well, the</b></p> <p>19 <b>reason I mentioned non-panel banks is because one of the</b></p> <p>20 <b>things that the Foreign Exchange and Money Markets</b></p> <p>21 <b>Committee was telling me was around something that you</b></p> <p>22 <b>raised which is credit tiering, about the fact that</b></p> <p>23 <b>banks that are not as strong have to pay more money.</b></p> <p>24 <b>When I raised these sorts of concerns, I was told by the</b></p> <p>25 <b>Foreign Exchange and Money Markets Committee, "This is</b></p>	<p>1 "Only Barclays have quoted real market rates"?</p> <p>2 <b>A. In his view.</b></p> <p>3 Q. Well, maybe in his view but it's unequivocal, isn't it?</p> <p>4 You can't misinterpret his view of what's taking place?</p> <p>5 <b>A. No. He's quite clear on what he thinks has happened,</b></p> <p>6 <b>yes.</b></p> <p>7 Q. Can we now turn, please, to JEX/015. I wonder if we can</p> <p>8 scroll down that e-mail. I'm afraid that's the wrong</p> <p>9 reference. I wonder if we can, from the larger bundles,</p> <p>10 go to 284, please. This I don't think will be in your</p> <p>11 hard copy bundle, Mr Ewan, but just bear with us for</p> <p>12 a moment whilst it's put on to the screen. Electronic</p> <p>13 284. It should be an e-mail of 3 September. (Pause)</p> <p>14 Thank you. Can you scroll slightly down that,</p> <p>15 please. This is an e-mail, Mr Ewan, from you</p> <p>16 to Alex Merriman, Angela Knight and Christopher Ford.</p> <p>17 Is Christopher Ford in the BBA?</p> <p>18 <b>A. Yes, Chris Ford was working with me.</b></p> <p>19 Q. It's titled, "Barclays and the BBA LIBOR". We'll come</p> <p>20 to this in a moment, but:</p> <p>21 "Further to our conversation, Miles Storey from</p> <p>22 Barclays has called me to discuss off the record</p> <p>23 Barclays's position re BBA LIBOR. Last week they</p> <p>24 contributed sterling rates of 6.8 above the Bank of</p> <p>25 England penalty rate and they expect to do so again this</p>
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<p>1 Mr Storey has said to you is contrary to the definition      2 of LIBOR or banks are submitting contrary to the      3 definition of LIBOR? Do you agree?</p> <p>4 <b>A. They are submitting contrary to the written definition.</b>      5 <b>I don't think that they are contributing against the</b>  <b>spirit of the definition.</b></p> <p>7 Q. Well, it comes down to boundaries. Who determines the      8 spirit in this instance if we've abandoned the written      9 definition?</p> <p>10 <b>A. We've touched on this before. I think the spirit of</b>      11 <b>something is necessarily a judgment. It's not something</b>      12 <b>that has a hard boundary because the definition has</b>      13 <b>a hard boundary but it's very clear, I think, what the</b>      14 <b>definition is trying to do, which is to --</b></p> <p>15 Q. Whose judgment?</p> <p>16 <b>A. I beg your pardon?</b></p> <p>17 Q. Whose judgment?</p> <p>18 <b>A. Any fair-minded person.</b></p> <p>19 Q. Is it the submitter? Is it the FXMMC? Is it the bank?      20 Is it the BBA?</p> <p>21 <b>A. Well, in that the FX and Money Markets Committee is the</b>      22 <b>ultimate arbiter, ultimately it's them but the</b>      23 <b>definition we were trying to be as clear as possible so</b>      24 <b>that there wouldn't be a requirement for interpretation,</b>      25 <b>which is why we spent so much time discussing it and</b></p>	<p>1 MR HAWES: Mr Ewan, I know you now have a hard copy of the      2 document that we were just looking at before lunch.</p> <p>3 <b>A. Yes.</b></p> <p>4 Q. I am just going to wait for it to come up for the jury.</p> <p>5 Thank you very much. This is the --</p> <p>6 MR CHAWLA: My Lord, I think -- sorry, Mr Hawes -- there's      7 a hard copy there.</p> <p>8 MR JUSTICE COOKE: Thank you.</p> <p>9 MR CHAWLA: The e-mail that we looked at just before lunch      10 is below this in the chain. So this is Alex Merriman's      11 response to you, about the Barclays issue?</p> <p>12 <b>A. Hmm, hmm.</b></p> <p>13 Q. He says:</p> <p>14 "My take on this is that there is no more      15 a reflection, though an obviously exaggerated, one of      16 the dealers continuing to quote high [I think that      17 should be 'clearers'] because of the shape of their      18 setting sterling long books and other non-sterling books      19 quoting low. Barclays are quoting so high because      20 clearly it is not in their interests to lend interbank      21 when there are questions being asked in the market over      22 their liquidity/funding.</p> <p>23 "We know that deriving long-term rates from swaps      24 for certain currencies happens and so the FX &amp; MM needs      25 to be reminded of 'going back to cash'. If necessary,</p>
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<p>1 <b>adding guidance.</b></p> <p>2 MR HAWES: Is that an appropriate moment, my Lord?</p> <p>3 MR JUSTICE COOKE: Yes, all right.</p> <p>4 MR CHAWLA: My Lord, can I indicate that e-mail that we're      5 looking at is the one that we'd seen earlier which was      6 3/9/07, page 31 of my Lord's bundle.</p> <p>7 MR JUSTICE COOKE: Thank you.</p> <p>8 MR CHAWLA: It's just that one. The reply isn't there, if      9 I may say so.</p> <p>10 MR JUSTICE COOKE: 2.05, please, members of the jury.      11 (In the absence of the jury)</p> <p>12 MR HAWES: Before your Lordship rises, it's not all of it      13 and I haven't told my learned friends but this is the      14 disclosure we received yesterday. There's a copy for      15 your Lordship. I'll ensure that that's passed up      16 through your clerk. Mr Convey printed it yesterday in      17 chambers. I'll ensure it's passed to your Lordship so      18 you can see it. If it's too small, please tell us      19 because some of the print is quite small and we'll have      20 it reprinted at some stage for you.</p> <p>21 MR JUSTICE COOKE: Thank you very much.      22 (1.06 pm)      23 (Luncheon Adjournment)      24 (2.05 pm)      25 (In the presence of the jury)</p>	<p>1 we think we might think about for market discipline      2 reasons putting out a press release along the lines that      3 we have discussed this with the FX &amp; MM and all LIBOR      4 panel contributors must provide 'true' prices to the      5 best of their ability, even in troubled market      6 conditions."</p> <p>7 Looking at that e-mail, Mr Ewan, which is from      8 Mr Merriman to you, this is all an internal BBA e-mail      9 at this stage, isn't it, still?</p> <p>10 <b>A. Yes.</b></p> <p>11 Q. Would you agree that there's a recognition there that      12 Barclays are not quoting -- well, do you think Barclays      13 are quoting an accurate rate?</p> <p>14 <b>A. I can't remember what I thought on Monday,</b>      15 <b>3 September 2007.</b></p> <p>16 Q. Because Barclays at this point in the market, at this      17 point in time, were higher than other banks, weren't      18 they?</p> <p>19 <b>A. I don't recall, but I'll accept that they were due to</b>      20 <b>the context.</b></p> <p>21 Q. The point about it was, actually, that Barclays may have      22 been the only one quoting their true rates; in other      23 words, all the other banks were low-balling. Does that      24 jog your memory?</p> <p>25 <b>A. I don't know because a lot of our conversation is around</b></p>
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<p>1   <b>accurate and true and the difficulty is that if there is</b>      2   <b>no market, it's very, very hard to say what a true price</b>      3   <b>is.</b></p> <p>4   Q. Right.</p> <p>5   A. So Alex Merriman has a view. I don't recall -- I think      6   the question was: what did I think and I don't recall      7   what I thought at the time.</p> <p>8   Q. Well, we're in September 2007. Quite a lot of events      9   had gone on in the economy at that stage; yes?</p> <p>10   A. Yes.</p> <p>11   Q. You have described the pressure that LIBOR was under at      12   that stage?</p> <p>13   A. Yes.</p> <p>14   Q. If I were to suggest that LIBOR was acting as      15   a barometer for banks' financial stability, would you      16   agree with that proposition?</p> <p>17   A. That is how it was being used, yes.</p> <p>18   Q. Thank you. Barclays were clearly quoting higher than      19   the rest of the pack because he says:      20         "Barclays are quoting so high ..."</p> <p>21   A. Yes.</p> <p>22   Q. "It's not in their interest to lend interbank when there      23   are questions in the market over their liquidity or      24   funding."</p> <p>25   In other words, they're lying between the rate of      Page 89</p>	<p>1   "true prices to the best of their ability"?</p> <p>2   A. Yes. We have been spending quite a lot of time on this      3   and it's because this is very difficult. It would be      4   like perhaps, as an example, asking a bunch of experts      5   what price they think something, maybe a Picasso      6   painting, would sell at auction without there actually      7   being that auction.</p> <p>8   Q. The point is there must have been quite a significant      9   amount of internal discussion at the BBA reflected in      10   these kind of e-mails about concern about the accuracy      11   of the rates?</p> <p>12   A. Yes, which is why we do what we can, which is bring the      13   matter to the attention of the committee, tell people      14   what the definition is and say that they have to do      15   their best to set accurate rates in difficult markets.</p> <p>16   Q. I move on, please, to JEX/017. I wonder if we could go      17   to the bottom of that e-mail. Thank you. I think      18   that's a wrong reference. Excuse me, my Lord. (Pause)      19         An e-mail for 7 September at the bottom, please.      20   I wonder if we can get to it another way. Could I have      21   page 910, please.</p> <p>22   MR CHAWLA: It is on there. It's the last page of JEX/017.</p> <p>23   MR HAWES: Can you scroll down. Thank you, Mr Chawla.      24         This is an e-mail from Angela Knight to you,      25   7 September 2007. A number of individuals copied in,</p> <p style="text-align: right;">Page 91</p>
<p>1   LIBORs to the banks's financial health. Do you not see      2   that connection?</p> <p>3   A. As I have said, it's not possible to know with absolute      4   certainty what the rate for any of these banks was,      5   I don't think, which is why at this time, in this      6   context, this e-mail trail describes internal      7   conversation at the BBA that conclude that, firstly, we      8   need to get the committee that is responsible together      9   to discuss and that there needs to be a restating that      10   the panel contributors must provide the best prices they      11   can.</p> <p>12   Q. He continues:      13         "We know that deriving long-term rates from swaps      14   for certain currencies happens and so the FX needs to be      15   reminded of 'going back to cash'."      16         Is he implying there that the use of long-term rates      17   from swaps is not in accordance with the definition?</p> <p>18   A. It comes back to whether there is cash in the market.      19         If there's not cash in the market, that's acceptable      20   because you have to do your best.</p> <p>21   Q. Why would he write:      22         "So they need to be reminded of 'going back to      23   cash'" if the former is acceptable?</p> <p>24   A. I don't know. You would need to ask him.</p> <p>25   Q. You have described what you think he means by the word      Page 90</p>	<p>1   all BBA, Mr Ewan; yes? Do you have it?</p> <p>2   A. This is on it's Friday, 7 September --</p> <p>3   Q. 7.17 in the morning.</p> <p>4   A. I'm looking at it, yes.</p> <p>5   Q. All to BBA individuals; yes? Subject, "LIBOR: two      6   things urgent", yes?</p> <p>7   A. Yes, those are all BBA people.</p> <p>8   Q. Thank you.</p> <p>9         "All, I think we need to tell our members what we're      10   doing with LIBOR primarily so that they know we are not      11   sitting on our hands but providing the info so that      12   discussions can be made. E-mail all counsel, new board,      13   CEOs wholesale [I think that should be], retail coms and      14   no doubt there are others as follows.</p> <p>15         As you are aware, the BBA runs LIBOR. In order to      16   assist the debate we have been issuing daily to the Bank      17   of England and to the thinking media plots of sterling      18   LIBOR, dollar LIBOR and Euro LIBOR and I attach the      19   latest set. These provide a quick pictorial comparator      20   of what is happening in the three markets and are      21   indicative of the different policies being followed. We      22   are giving factual explanations to the many queries that      23   we have been receiving and we're also in constant      24   contact with the bank ..."</p> <p>25         That being the Bank of England, is that right,      Page 92</p>

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<p>1       Mr Ewan?</p> <p>2       <b>A. Yes.</b></p> <p>3       Q. "... and I trust you find the attachments of interest</p> <p>4       and would be grateful for any posts that you may have.</p> <p>5       "The next is touching on press. Something similar</p> <p>6       should go in the morning. When is LIBOR fixed for the</p> <p>7       day? Is it 11.00 am? If so, get everything ready and</p> <p>8       as soon as there is a fix, then plot and send. I would</p> <p>9       like it on their desks by midday.</p> <p>10      "The next is the press. Pete, suggest you speak to</p> <p>11     the Evening Standard. They have not done much on this</p> <p>12     yet. They go to press around 9.00 am but nevertheless</p> <p>13     worth an early chat on yesterday's figures. The</p> <p>14     weekenders, both Sat and Sunday, are going to do</p> <p>15     something. I think the line that will be taken is that</p> <p>16     interest rates stay steady but the cost of money has</p> <p>17     gone up and so will mortgages, new ones that is, and</p> <p>18     remortgages. Not an easy one. Also the line that they</p> <p>19     might take is that banks have lost money by gambling in</p> <p>20     the US and now it's the poor British householder who</p> <p>21     will pay. I think the line that we should take is that</p> <p>22     Brits actually not hard hit, it's the Germans who are.</p> <p>23     This is a tricky time but the long-term rates are pretty</p> <p>24     steady so don't panic and don't despair. There may well</p> <p>25     be some changes but not necessarily. Shop around for</p>	<p>1       PR office?</p> <p>2       <b>A. I believe the -- well, ultimately the tone and the line</b></p> <p>3       <b>would be dictated by Ms Knight and some of the people on</b></p> <p>4       <b>this e-mail are in the BBA's press office and I think</b></p> <p>5       <b>would understand that they are being given instruction</b></p> <p>6       <b>by Ms Knight.</b></p> <p>7       Q. I wonder if we can just scroll up, please, to the bottom</p> <p>8       of page 908 in the corner. The same chain,</p> <p>9       Alex Merriman, 7 September, later in the morning:</p> <p>10      "I spoke to Simon Wells last night. Vanessa Crowe</p> <p>11     from the bank's press office was also on the call."</p> <p>12      Simon Wells was who?</p> <p>13      <b>A. I don't recall, but I think from context he would have</b></p> <p>14      <b>been somebody at the Bank of England.</b></p> <p>15      Q. Thank you.</p> <p>16      "Essentially the bank noted that when LIBOR was</p> <p>17     compared with other rates, such as government bonds or</p> <p>18     swap rates, the divergences, which are apparent between</p> <p>19     the UK and the euro dollar, particularly at</p> <p>20     three months, are not nearly so marked. They're</p> <p>21     obviously uneasy that UK sticks out like a sore thumb.</p> <p>22     I said their comments were noted and I would pass on.</p> <p>23     I said that it was not our job to compare LIBOR with</p> <p>24     other rates but that obviously there was interest in the</p> <p>25     way LIBOR rates had developed and that was what we felt</p>
<p style="text-align: center;">Page 93</p> <p>1       the mortgage. It's a good time to save. Also release</p> <p>2       the plots and make sure that it is well understood that</p> <p>3       money problem lies with the bank and I'm afraid I think</p> <p>4       that should be of England, not us, but do not get</p> <p>5       quoted. Problems with press at all, call me. It's</p> <p>6       a delicate balancing act. Angela."</p> <p>7       I have shown you that for two reasons, Mr Ewan. The</p> <p>8       first is Ms Knight, as the CEO of the BBA, took an</p> <p>9       increasing control over the day-to-day press relations</p> <p>10      of LIBOR?</p> <p>11      <b>A. Ms Knight was in direct control of all aspects of the</b></p> <p>12      <b>BBA's press policy about everything. It's just that she</b></p> <p>13      <b>thinks that LIBOR is becoming a story so her focus turns</b></p> <p>14      <b>to LIBOR.</b></p> <p>15      Q. It reflects the pressure that you were under at that</p> <p>16      stage that you have talked about and I've shown it for</p> <p>17      that reason, contemporaneous evidence of the pressure</p> <p>18      that LIBOR was suffering from?</p> <p>19      <b>A. Yes.</b></p> <p>20      Q. Was the BBA concerned about the media and reputation --</p> <p>21      media comment about the reputation of the BBA?</p> <p>22      <b>A. Of course.</b></p> <p>23      Q. Not just the rate but the BBA?</p> <p>24      <b>A. Yes.</b></p> <p>25      Q. Who controlled the publicity for that, you, Ms Knight,</p>	<p style="text-align: center;">Page 95</p> <p>1       competent to comment on. All in all this left me</p> <p>2       feeling that we should try to be bit more nuanced in</p> <p>3       what we say to the market. Notably perhaps in noting</p> <p>4       that LIBOR on LIBOR is just one way of measuring what is</p> <p>5       happening in money markets and that there are different</p> <p>6       indicators and approaches as well."</p> <p>7       Did the Bank of England suggest to you, certainly</p> <p>8       directly, Mr Ewan, that the LIBOR rates were inaccurate?</p> <p>9      <b>A. I don't recall that they ever did.</b></p> <p>10     Q. There was concern about the rates understandably, given</p> <p>11     their reflection of financial health of the market; yes?</p> <p>12     <b>A. Yes.</b></p> <p>13     Q. As time moves on, the concern develops to such a point,</p> <p>14     as we will see this afternoon, Ms Knight gets the CEOs</p> <p>15     of the banks in to have a chat with them; yes?</p> <p>16     <b>A. I don't recall Angela ever getting the CEOs of the --</b></p> <p>17     <b>when you say "the banks", do you mean participating</b></p> <p>18     <b>banks?</b></p> <p>19     Q. Panel banks.</p> <p>20     <b>A. I don't recall her ever getting the CEOs in for</b></p> <p>21     <b>a physical meeting. I know she wrote to them.</b></p> <p>22     Q. All right. Let's move slightly up the e-mail, please.</p> <p>23     Again, you're copied into all of this. This is from</p> <p>24     Michael McKee, who is obviously the executive director</p> <p>25     of wholesale:</p>

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<p>1        "Alex, I don't have a problem with a bit more nuance      2        but overall I think we need to keep on the side of the      3        line which John has been keeping, i.e. explanation of      4        LIBOR plus information, rather than commentary on market      5        movements/speculation."</p> <p>6        Why did you maintain that line as described there?</p> <p>7        <b>A. Well, I think, without having more context, what that</b>      8        <b>says is that I have been told by my senior management</b>      9        <b>that if the press asks questions, I can offer factual</b>      10      <b>information about LIBOR but not more than that.</b></p> <p>11      Q. Because you found yourself -- and I think probably about      12      this period, but moving forward -- thrust a little into      13      the limelight. Would you agree with that? You were      14      doing radio. You were doing television.</p> <p>15      <b>A. Yes.</b></p> <p>16      Q. Published articles in The Economist, trying to take the      17      line of defending LIBOR; yes?</p> <p>18      <b>A. Yes.</b></p> <p>19      Q. Dealing with the Wall Street Journal article, as we'll      20      come on to see; yes?</p> <p>21      <b>A. Yes.</b></p> <p>22      Q. And we've already reflected on the FT article much      23      earlier in this chronology and did you deal with that?</p> <p>24      <b>A. I didn't -- it depends what you mean by "deal with".</b>      25      <b>I would -- as we seem to see here, I'm told, "Go and</b></p>	<p>1        <b>A. I don't recall ever speaking to Simon Green, but I may</b>      2        <b>well have done.</b></p> <p>3        Q. Where would that have been noted?</p> <p>4        <b>A. I may or may not have noted that in my handwritten</b>      5        <b>notebook.</b></p> <p>6        Q. Because that's another example, isn't it, Mr Ewan, of      7        someone who is offering to provide evidence about      8        potential failings, let's put it that way, with LIBOR?</p> <p>9        <b>A. Yes.</b></p> <p>10      Q. So you would have followed that up, would you?</p> <p>11      <b>A. I cannot say absolutely whether I would or would not</b>      12      <b>have, but it was part of my job to speak to people who</b>      13      <b>had comments, queries or complaints about LIBOR.</b></p> <p>14      Q. Go to JEX/022, please. Now, this is a document which      15      I'm not sure you were copied into, Mr Ewan, but I want      16      to ask you about it because it's dated in October 2007,      17      a month later; all right?</p> <p>18      <b>A. Yes.</b></p> <p>19      Q. Did you see this when you were shown documentation from      20      the Serious Fraud Office? Do you have a memory of it,      21      or not?</p> <p>22      <b>A. I can't remember, I'm afraid. I saw an awful lot of</b>      23      <b>documents.</b></p> <p>24      Q. All right. Let's look at it together.</p> <p>25      MR CHAWLA: He wasn't shown it, so I'm not sure how he can</p>
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<p>1        <b>give factual information about LIBOR". Whether that's</b>      2        <b>dealing with it, I don't know. I answered questions.</b></p> <p>3        Q. Who would tell you to do that?</p> <p>4        <b>A. Angela.</b></p> <p>5        Q. So that would come from the BBA?</p> <p>6        <b>A. Yes.</b></p> <p>7        Q. Let's look, please, at JEX/021. I have taken a few of      8        the documents, my Lord, from your bundle so I'm not      9        going to take those. This is an mail that is ultimately      10      forwarded to you, I think, Mr Ewan, and you're aware of      11      it; all right? I'm not showing you that at the moment      12      but just so you can see this. It's from Simon Green and      13      it's to Christopher Ford. Christopher was who?</p> <p>14      <b>A. He was somebody who worked with me on LIBOR.</b></p> <p>15      Q. So he was one of your assistants, was he?</p> <p>16      <b>A. Yes.</b></p> <p>17      Q. "Hi Chris, I wonder if you would be able to help me.      18      I work at RBS as an interest rate derivatives trader and      19      obviously a number of my instruments fix against LIBOR.      20      Today I think there have been some serious issues with      21      certain banks' LIBOR inputs and I would like to speak to      22      someone at the BBA to raise my concerns. If you or one      23      of your colleagues can help me [he then gives his      24      number] give me a call effectively."</p> <p>25      Now, was that followed up?</p>	<p>1        comment on it.</p> <p>2        MR HAWES: Thank you. In which case, we'll deal with it      3        with someone else.</p> <p>4        JEX/023. Just look at the top of that again. Was      5        that -- before we look at the detail, can we focus in on      6        the top of that only, please, and not its content.</p> <p>7        Again, was that a document that you saw?</p> <p>8        <b>A. I don't recall it.</b></p> <p>9        Q. Thank you. Take that down. Thank you.</p> <p>10      JEX/024. You were present at this meeting. Let me      11      just get my -- how frequently would you attend the Money      12      Markets Liaison Group, Mr Ewan?</p> <p>13      <b>A. In 2007 I believe infrequently. You can see that where</b>      14      <b>my name is listed, it says "alternate" because the BBA's</b>      15      <b>usual representative was Alex Merriman.</b></p> <p>16      Q. Go to paragraph 2 of that note, please. I wonder if we      17      can just bring that up. "Interbank market and LIBOR      18      fixings":</p> <p>19      "Several group members thought that LIBOR fixings      20      had been lower than actually traded interbank rates      21      through the period of stress. LIBOR indices needed to      22      be of the highest quality given their important role as      23      a benchmark for corporate lending and hedging and as      24      a reference rate for derivative contracts. Mr Ewan      25      outlined the quality, control and safeguard measures</p>
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<p>1 used by the BBA to ensure the quality of LIBOR.      2 Dispersion between panel banks submissions had increased      3 during August but had since fallen back, in part      4 reflecting clarification on the BBA on LIBOR      5 definitions."</p> <p>6 Outlining the quality, control and safeguarding      7 measures, what does that refer to at that point in time?</p> <p>8 <b>A. I can't remember exactly what was in place at that time,      9 but I think -- I think by this point we are preparing      10 for the Foreign Exchange and Money Markets Committee      11 regular reports on the inputs into the rates.</b></p> <p>12 Q. Did you reflect at that meeting to the participants the      13 reports that you had received, certainly it looks like      14 about low-balloting, talks about rates? Did you reflect      15 at that meeting some of the concerns that had been      16 expressed about fixing against books?</p> <p>17 <b>A. I can't remember.</b></p> <p>18 Q. Because it was, shall we say, an acknowledged activity      19 in 2007, looking at the relationship meetings we looked      20 at, 2006, 2005, that there was a relationship between      21 banks' books and LIBOR, do you agree?</p> <p>22 <b>A. We had had suggestions, reports, accusations that it      23 happened which we did our very best to put right.</b></p> <p>24 Q. Thank you for that, but was it acknowledged by that      25 stage, as reflected in the meeting notes that you have</p>	<p>1 November 2007. This is an e-mail from you, again      2 I suggest to the FXMMC, is that correct?</p> <p>3 <b>A. Yes.</b></p> <p>4 Q. Thank you.</p> <p>5 "All, I'm starting to receive more and more comments      6 and queries on the levels at which rates are currently      7 setting. These universally state that the rates are      8 unrealistically low as the few offers of cash in the      9 market are well above posted BBA LIBOR rates. Others      10 comment that the LIBOR rates do not correlate accurately      11 with other market indicators."</p> <p>12 I will go through the e-mail entirely and ask you      13 some questions about it:</p> <p>14 "Currently these queries are coming largely from      15 hedge funds, non-contributing banks and the occasional      16 broker. As I understand it, the Bank of England is      17 informally asking questions of market participants and      18 I know that this is an issue in which Paul Tucker is      19 interested. I would very much like to avoid any further      20 short-term bad publicity such as a further hostile FT      21 article, but more importantly I do not want the fixings      22 to lose credibility in the market. I'm not best placed      23 to judge this but I would welcome your views on whether      24 rates in the market are currently artificially low.</p> <p>25 I realise that this is not a straightforward question as</p>
<p style="text-align: center;">Page 101</p> <p>1 taken with panel banks between 2005 and 2007, that banks      2 were commercially setting against their LIBORs?</p> <p>3 <b>A. I really can't remember the exact state of mind or state      4 of certainty that I was in at November 2007.</b></p> <p>5 Q. Well, earlier that year we've looked at -- in fairness      6 to you it doesn't talk about derivatives but it talks      7 about manipulation -- in the 2007 panel visits the      8 possibility of former manipulation taking place, let's      9 put it that way, in 2007? Do you remember the      10 references, "It's going well. It's working well now,      11 you know, all the problems that have been existing"?</p> <p>12 <b>A. And that would, I think, having read through the      13 documents with you earlier today, have been my view.      14 There wasn't unanimity on this, but I think the --      15 I think it's fair to say that the composite generally      16 held view was that the rates were about as accurate as      17 they could be, given what was going on.</b></p> <p>18 Q. The question was not just about accuracy. It was      19 a question that it was a received wisdom that some banks      20 submitted LIBORs for commercial advantage?</p> <p>21 <b>A. That was certainly something that was put to the BBA      22 repeatedly.</b></p> <p>23 Q. Thank you. JEX/026, please. I wonder if we can just go      24 to the bottom of that e-mail, please. It's the      25 penultimate page. Thank you. We have moved now to</p>	<p style="text-align: center;">Page 103</p> <p>1 the interbank market is not functioning as usual at the      2 moment. Further, if this group agrees that rates may be      3 too low or are concerned that there might be      4 a perception that this is the case, I would welcome      5 views on how we address this. My view is that we can do      6 no harm by writing to all contributors to the rates.      7 I envisage that such a letter would note that there is      8 a heightened scrutiny of the rates at the moment      9 combined with difficult conditions and differing views      10 of the market and remind all contributors of the      11 definition of LIBOR and the instructions to      12 contributors. We might also mention that the FX &amp; MM      13 committee scrutinising the rates as membership of the      14 bank is at the invitation of the FX &amp; MM panel members      15 and may be replaced at the discretion of the committee.      16 "Sorry to be intruding on your time. Given the      17 state of the markets, I believe it is important we      18 actively consider these matters now to avoid any      19 possible tarnishing of the reputation of the rates and      20 also in order to demonstrate to market participants that      21 there is an effective governance of the rate setting      22 process."</p> <p>23 Then you invite everyone for a conference call, all      24 right? Now, within that you clearly are, as you have      25 said to the jury, trying to maintain the rate, the</p>

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<p>1       accuracy of the rate; yes?</p> <p>2   <b>A. Yes.</b></p> <p>3   Q. But you're also reflecting, aren't you, the overwhelming</p> <p>4       amount of information that you had received that</p> <p>5       low-balling was taking place?</p> <p>6   <b>A. As I say, there are comments saying that it's happening,</b></p> <p>7       yes.</p> <p>8   Q. If we scroll up, please. This is again you circulating</p> <p>9       an e-mail, again 6 December, so a few days after that</p> <p>10      first e-mail:</p> <p>11        "I have received mixed responses to my previous</p> <p>12       e-mail. Some committee members agree that LIBOR rates</p> <p>13       are currently setting below 'real' market rates but</p> <p>14       others do not feel that this is the case, at least as</p> <p>15       a general statement across all currencies."</p> <p>16        Pause there. There was a distinction, wasn't there,</p> <p>17       Mr Ewan, between the problems that LIBOR experienced in</p> <p>18       US dollar and other currencies?</p> <p>19   <b>A. Yes, there was, because the committee and the BBA knew</b></p> <p>20       <b>that there were a lot more financial instruments,</b></p> <p>21       <b>products that referenced dollar LIBOR more than the</b></p> <p>22       <b>other currencies.</b></p> <p>23   Q. Please tell me if you disagree. The currencies that the</p> <p>24       BBA were particularly focusing on at this stage, in this</p> <p>25       period of volatility, were dollar, sterling and euros,</p> <p style="text-align: center;">Page 105</p>	<p>1   <b>A. I don't recall. I do recall in general that amongst the</b></p> <p>2       <b>people that I spoke to, in general, there was a marked</b></p> <p>3       <b>reluctance to point fingers or tell tales.</b></p> <p>4   Q. It would have required, wouldn't it, the appropriate</p> <p>5       questioning of an individual when they provide</p> <p>6       information? Would you agreed with that?</p> <p>7   <b>A. But it may well have been -- I can't recall the exact</b></p> <p>8       <b>details surrounding this -- that I did and whoever was</b></p> <p>9       <b>speaking to me said, "I don't want to tell you" and</b></p> <p>10       <b>I did not have any abilities to make them.</b></p> <p>11   Q. So are there instances where that response was given to</p> <p>12       you? Are there instances where that response was given</p> <p>13       to you, "I don't want to tell you"?</p> <p>14   <b>A. I can't recall a specific example, but, yes, it was --</b></p> <p>15       <b>there was -- it was -- the people that I spoke to didn't</b></p> <p>16       <b>want to name names.</b></p> <p>17   Q. I'm going to suggest, Mr Ewan, there are instances where</p> <p>18       you didn't pursue it because of the tension of the BBA</p> <p>19       with its members.</p> <p>20   <b>A. Yes, I can -- I can recall on one occasion not asking</b></p> <p>21       <b>and --</b></p> <p>22   Q. Because ...?</p> <p>23   <b>A. I beg your pardon?</b></p> <p>24   Q. Because ...?</p> <p>25   <b>A. I wouldn't -- it wasn't clear to me what I would have</b></p> <p style="text-align: center;">Page 107</p>
<p>1       in particular?</p> <p>2   <b>A. From what I recall, yes, I think that's fair.</b></p> <p>3   Q. Thank you.</p> <p>4       Let's return to the e-mail:</p> <p>5       "There is certainly agreement that usual market</p> <p>6       conditions are not in effect and the concept of</p> <p>7       reasonable market size has moved to a much smaller</p> <p>8       amount now relative to earlier in the year."</p> <p>9       That being a reference back in quotes to the</p> <p>10      definition; yes?</p> <p>11   <b>A. Reasonable market size is a term in the definition, yes.</b></p> <p>12   Q. Thank you.</p> <p>13       However, I have heard from two sources as yet</p> <p>14       unnamed contributor banks have offered to take US</p> <p>15       dollars at 10 basis points above the rates they</p> <p>16       submitted to the fixing process earlier in the day.</p> <p>17       I feel strongly that if this is true, it must be not</p> <p>18       allowed to continue. Such allegations are extremely</p> <p>19       damaging to the credibility of the LIBOR rate at any</p> <p>20       time and in the current market climate when the fixings</p> <p>21       are under heightened scrutiny I believe that they must</p> <p>22       be seen to be taking action to ensure the accuracy of</p> <p>23       the rates."</p> <p>24       Did you make or take steps to find out who those two</p> <p>25       contributor banks were?</p> <p style="text-align: center;">Page 106</p>	<p>1       <b>been able to do with that information.</b></p> <p>2   Q. You will see an example of that later.</p> <p>3       So:</p> <p>4       "Some members of the committee have noted that</p> <p>5       a threat to replace existing panel members could be</p> <p>6       counter-productive as existing panels are a good</p> <p>7       representation of those banks that are at the top of the</p> <p>8       credit spectrum. Appointing panel members who might pay</p> <p>9       higher rates would undermine the rate as the reputation</p> <p>10       of the lowest available real world rate. This clearly</p> <p>11       is an issue of concern but I'm not sure this matters if</p> <p>12       the market begins to question whether BBA LIBOR</p> <p>13       currently reflects the real world anyway."</p> <p>14       That was the position, wasn't it, Mr Ewan? At that</p> <p>15       stage, at that point there was significant questions</p> <p>16       about the accuracy of the rates and whether they</p> <p>17       reflected real world?</p> <p>18   <b>A. Yes.</b></p> <p>19   Q. Thank you.</p> <p>20       "Apart from my concerns about credibility of the BBA</p> <p>21       product, if the rates are in fact too low this will not</p> <p>22       help contributors or the wider market in the longer</p> <p>23       term. For example, the Monetary Policy Committee pays</p> <p>24       close attention to the BBA LIBOR rate in its</p> <p>25       decision-making process and any possible inaccuracy in</p> <p style="text-align: center;">Page 108</p>

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<p>1 the rate may influence their action. For these reasons      2 I would like permission from the committee members to      3 write to all contributors banks to remind them of the      4 definition of LIBOR, their undertaking to submit      5 accurate rates and inform them that it is the FX &amp; MM      6 committee's view that reasonable market size has shrunk      7 considerably in the last few months."</p> <p>8 Pausing there. Letters did go out, as you have      9 described, to contributing panel banks; yes?</p> <p>10 <b>A. Yes.</b></p> <p>11 Q. But in the context in which we're now dealing with it,      12 there was obviously a groundswell of banks that were on      13 occasion ignoring the BBA's recommendations?</p> <p>14 <b>A. I don't think that's a safe conclusion.</b></p> <p>15 Q. So you don't think that even members of the FXMMC were      16 low-balling?</p> <p>17 <b>A. It comes back to the point we've discussed many times,      18 which is it's very, very difficult to know because what      19 was the real rate in a market where there isn't actual      20 cash? It's extremely hard to prove and to know and we      21 could through the evidence find many, many occurrences      22 of participant banks saying, "This happens but it's not      23 me".</b></p> <p>24 Q. Yes, agreed.</p> <p>25 <b>A. And my response to this at the time was to try to get</b>        Page 109     </p>	<p>1 the submission?</p> <p>2 <b>A. As I've said, banks were very reluctant to actually name      3 names.</b></p> <p>4 Q. Let's look slightly further up that e-mail then to the      5 next e-mail on the chain, over the page. This is from      6 Phil Rawlins at Bank of Scotland. Was he on the FXMMC?</p> <p>7 <b>A. I think he was.</b></p> <p>8 Q. This is now 6 December on this chain:</p> <p>9 "John, I can confirm that there are banks setting      10 LIBORs well below the level that they're paying in the      11 market. We are not one of them."</p> <p>12 Pausing there. Evidence, as you say, of exactly      13 what you have just described here; yes?</p> <p>14 <b>A. Yes.</b></p> <p>15 Q. "The issue is particularly obvious in dollars. Whilst      16 this is frustrating and complicating the funding      17 process, we're largely ignoring LIBORs now in a cash      18 sense as the absolute level of markets seems to be more      19 relevant. By this I mean the implied cost of funds      20 generated from the FX swap price (3 sterling swap to      21 dollar LIBOR plus 20 basis points)."</p> <p>22 As for enforcing the LIBOR definition, while      23 I welcome this initiative it is likely to be      24 unproductive. For some years the concept of funding      25 levels beyond three months has been completely        Page 111     </p>
<p>1 <b>the committee to agree that there should be therefore      2 blanket instructions to all submitters to say, "Please      3 submit accurate rates".</b></p> <p>4 Q. Did you not think it was part of your responsibility to      5 undertake some investigative steps to acquire evidence      6 when you were told about these events, to then put it in      7 front of the FXMMC?</p> <p>8 <b>A. Yes, and I did.</b></p> <p>9 Q. Right. The evidence would have taken the form      10 presumably of you speaking to the relevant banks?</p> <p>11 <b>A. Yes.</b></p> <p>12 Q. Where, firstly, the complaint arose?</p> <p>13 <b>A. Yes.</b></p> <p>14 Q. They saying, as you have just described, "It's not us,      15 it's someone else"?</p> <p>16 <b>A. Well, it depends whether it was a general or a specific      17 allegation.</b></p> <p>18 Q. If they then sought to deflect the attention to another      19 bank, it would have required you to have asked which      20 bank; yes?</p> <p>21 <b>A. Yes.</b></p> <p>22 Q. Did you do that?</p> <p>23 <b>A. I don't recall.</b></p> <p>24 Q. Having asked which bank, presumably you would have then      25 taken the step of phoning up the person responsible for        Page 110     </p>	<p>1 speculative and therefore based on the futures strip and      2 more accurately the swap level for the comparative      3 period. The issue created by the credit crisis is that      4 the spread between annual three swap, for example, and      5 LIBOR has diverged from the consistent 2 basis points      6 between 10 and 30 basis points at present. Where is the      7 real money coming? It's not. What benchmark should you      8 use to set LIBORs? Arguably the swap rate. This is      9 clearly happening at some banks and while the cash      10 market is restricted to sub 90 days, it's hard to argue      11 against it."</p> <p>12 Just pausing there. Against the swap rate, would      13 that have been consistent with the definition at that      14 stage?</p> <p>15 <b>A. No.</b></p> <p>16 Q. So it would have required, in light of the evidence you      17 have given, for him -- did you speak to him about which      18 banks were doing this?</p> <p>19 <b>A. I can't remember.</b></p> <p>20 Q. "Separately many institutions set their LIBORs based on      21 their derivatives reset position which under normal      22 conditions cannot be manipulated because of the      23 stability suggest above. When markets become volatile,      24 their real intentions become clear."</p> <p>25 What did you understand that sentence to mean?        Page 112     </p>

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<p>1   <b>A. I can't remember what I -- what construction I placed on</b>      2   <b>that when I received it.</b></p> <p>3   Q. He's clearly identified to you, Mr Ewan, hasn't he,      4   that, as he says, many institutions set their LIBORs      5   based on their derivative reset position; yes?</p> <p>6   <b>A. That's what Phil Rawlins says.</b></p> <p>7   Q. Would that have been consistent with type 1 activity or      8   was that something else?</p> <p>9   <b>A. If you're setting your LIBOR because of your derivatives</b>      10   <b>position, that's wrong.</b></p> <p>11   Q. So do you now understand that extract to have been      12   inconsistent with the LIBOR definition?</p> <p>13   <b>A. Yes.</b></p> <p>14   Q. And he is a member, I think you said, of the FXMMC?</p> <p>15   <b>A. I think so. I couldn't say to be absolutely sure.</b></p> <p>16   Q. Some of the communications that you're receiving are      17   directly from your committee members; yes?</p> <p>18   <b>A. Hmm, hmm.</b></p> <p>19   Q. Reflecting this activity going on, whether it be      20   low-balling, derivative reset positions that we've just      21   looked at, but in essence what you're doing is      22   therefore, as I understand it, taking back to the people      23   who have informed you about it, is that right?</p> <p>24   <b>A. Well, I think what we did in this particular case is at</b>      25   <b>or very shortly afterwards we had a meeting of all of</b></p>	<p>1   "Oh interesting times, as the Chinese would say."</p> <p>2   You laugh.</p> <p>3   "You may live in them, yes.</p> <p>4   "Indeed" says Miles.</p> <p>5   "Good old LIBORs. Appearance at the turn of the</p> <p>6   year in the one month and stuff.</p> <p>7   "Yes."</p> <p>8   Pausing there. What do you think he meant by the</p> <p>9   "appearance of the turn of the year in the one month and</p> <p>10   stuff"? Do you know?</p> <p>11   <b>A. Well, I think I can take a reasonably informed stab at</b>      12   <b>that. I think what tends to happen -- what you find</b>      13   <b>happening is there's an effect with LIBORs where as you</b>      14   <b>get to the year-end, because a bank has to ensure that</b>      15   <b>it is funded across the year-end, when you get to the</b>      16   <b>day which is one month away from the last business day</b>      17   <b>banks try to ensure that they are funded so they will be</b>      18   <b>very keen to borrow which means that there are lots of</b>      19   <b>people who want -- in the market to borrow one month</b>      20   <b>money which means that the price will go up and that's</b>      21   <b>a simple supply and demand effect.</b></p> <p>22   Q. Yes.</p> <p>23   <b>A. And this seems to be November 29th and so it's probably</b>      24   <b>a month before the last business day, so this is</b>      25   <b>probably a discussion around the appearance or</b></p>
<p style="text-align: center;">Page 113</p>	<p style="text-align: center;">Page 115</p>

<p>1   <b>the contributor banks, to which Ms Knight attended, and</b>      2   <b>laid out to them why it is so important that they need</b>      3   <b>to submit accurate LIBOR rates.</b></p> <p>4   Q. You knew by that stage, didn't you, that people were      5   setting prices that were not the reality of the prices      6   in the market?</p> <p>7   <b>A. Which is why we tried our very best to do everything</b>      8   <b>within our abilities to make sure that people set</b>      9   <b>accurate LIBORs.</b></p> <p>10   Q. If you had been given examples I think we've touched on      11   already of other banks and those banks were named, you      12   would have taken steps, would you? Is that what you're      13   saying?</p> <p>14   <b>A. Yes.</b></p> <p>15   Q. I wonder if we can please have on the screen JEX/028.      16   This is a transcript, Mr Ewan, of you and Mr Storey. So      17   the jury can follow it and you can follow it -- I think      18   you have it in your hard copy -- I think we also have      19   the associated audio with it, if that could be played,      20   please.</p> <p>21         (Video recording played to the court)</p> <p>22         That's not the one. Is there one under JEX/028?</p> <p>23         Let's read it. Mr Ewan and you are speaking:</p> <p>24         "Hi, it's Miles from Barclays.</p> <p>25         &gt;Hello, how are you?</p>	<p>1   <b>non-appearance or size of that spike.</b></p> <p>2   Q. Thank you. Miles says:</p> <p>3   "I know we've talked about this, you know, and where</p> <p>4   people are setting them versus the reality of the prices</p> <p>5   in the market.</p> <p>6   "Yep.</p> <p>7   "I think this is sort of raising its head again.</p> <p>8   " Hmm, hmm.</p> <p>9   "Just talking off the record so that you're aware,</p> <p>10   on the one dollar month for instance.</p> <p>11   "Yeah.</p> <p>12   "The highest, I think the highest setting today was</p> <p>13   5.30 and we were one of those people. It's actually in</p> <p>14   the market at 40, 50 and 60 and there are some people</p> <p>15   putting in settings of 15.</p> <p>16   "Right.</p> <p>17   "One person, for instance, setting at 15 was RBS and</p> <p>18   yet ABN was paying 50 and getting money. How that sort</p> <p>19   of thing, you know, I'm not saying that ABN is RBS,</p> <p>20   et cetera, et cetera, and I'm not trying to pick on them</p> <p>21   as particularly counterparty -- particular counterparty</p> <p>22   because there are other people setting them down in the</p> <p>23   15s, 18s and 20s but, you know, the divergence between</p> <p>24   where people are putting them for whatever reason and</p> <p>25   where they're actually trading, if they're trading at</p>
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<p>1 all, but also where people may be doing things with      2 corporates is beginning to sort of creep out of the      3 woodwork and I think, you know, you as the BBA, we as      4 the BBA, might see some of something coming 'our way'.      5 The other thing I would make an observation is that we      6 believe that the FSA has been talking to people, like      7 brokers, about their responsibility when giving      8 indications of market prices for the purposes of fair      9 valuing.</p> <p>10 "Right.      11 "Now that could easily creep into all you might say      12 that a broker might start thinking about. Are they      13 referring to where I sell people, where I say to banks      14 I think LIBOR might be? You know, how LIBOR fixings      15 work, half the time banks actually ask brokers.      16 "Yeah.      17 "Banks ask the brokers where the market is, as      18 against a bank working out where the market is so,      19 again, I'm not saying that the FSA are looking at      20 LIBORs, it would surprise me if they were and even if      21 they did they would probably only come back to you guys.      22 those guys.      23 "Yeah.      24 "On the topic but I think that second point I'm      25 making is more something that somebody said to me and</p>	<p>1 <b>A. Yes.</b>      2 Q. We referred earlier to Barclays at one point earlier in      3 the year being consistently higher in the rates; yes?      4 <b>A. Yes.</b>      5 Q. As a result of which, they attracted adverse financial      6 media comment about their financial health?      7 <b>A. Yes.</b>      8 Q. It was one of the reasons that provoked low-balling, do      9 you agree with that?      10 <b>A. It was certainly one of the factors in banks becoming</b>  <b>concerned about what their LIBOR submissions could be</b>  <b>interpreted as.</b>      13 Q. We'll come on to it in a second. He actually deals with      14 it, but he's just said to you:      15 "Banks are afraid to stick their heads above the      16 parapet."      17 He continues:      18 "Barclays has got a problem because it's posting      19 higher LIBORs than anyone else and, that having      20 happened, I think people are reluctant to post higher      21 because no one will get out of the pack. The pack sort      22 of stays low."      23 He's explicitly telling you, isn't he, Mr Ewan,      24 about the existence of low-balling?      25 <b>A. He says -- he says what he says. He says that Barclays</b>  <span style="text-align: right;">Page 119</span> </p>
<p>1 they were interpreting it around LIBORs.      2 "Right.      3 "The next question is what do you do or what do you      4 do but I think market stress is starting to show this      5 one up and I think, you know, in good times everyone's      6 happy but at the moment this isn't. It's not a good      7 time and I'm staring -- I must admit, I'm starting to      8 hear this more often.      9 "Yeah.      10 "One of the vulnerabilities of the BBA and the      11 indices as indices is, you know, accusations or comments      12 around the risk -- without being too emotive --      13 manipulation for whatever reason is going to come out.      14 Now you could say what's the point, you know, because      15 we've had this before about the top four and the bottom      16 four have dropped out but as an aggregate I believe, you      17 know, I'm not going to say whether I think manipulation      18 is or isn't going on because I think it's far too      19 difficult to point that out, but I do believe that      20 LIBORs are being set lower than they ought to be because      21 in the aggregate banks are afraid to stick their heads      22 above the parapet and post higher numbers because what      23 happened to us when we did, you get shot at."      24 Pause there for one moment. Miles Storey is at      25 Barclays; yes?</p>	<p>1 <b>attracted adverse comment when they posted numbers</b>  <b>higher than other banks.</b>      3 Q. What did you understand when he was saying to you,      4 "Stick their head above the parapet, they're afraid to"?      5 <b>A. Well, what -- he says that he feels that Barclays posted</b>  <b>higher LIBORs and people then questioned Barclays.</b>      7 Q. Is this what you would describe as only the smoking gun      8 or type 2 activity?      9 <b>A. It's not a smoking gun because I wasn't shown Barclays</b>      10 <b>posting a LIBOR at a level and then borrowing in the</b>      11 <b>market at a higher level.</b>      12 Q. Forgive me, that's not the point. He is saying, "We are      13 above the pack". You would have had the rates available      14 to you; yes?      15 <b>A. Yes.</b>      16 Q. He would have at this stage -- Barclays would have been      17 an outlier at the top by some margin in certain      18 currencies?      19 <b>A. Yes.</b>      20 Q. It's not about his LIBOR but everyone else's?      21 <b>A. Well, if he's posting where he thinks he needs -- if</b>      22 <b>he's putting the rate in that he thinks is the rate at</b>      23 <b>which he gets money and other banks are putting in the</b>      24 <b>rate at which they think they get money, you know,</b>      25 <b>I can't exactly recall and construct the credit quality</b></p>

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<p>1       <b>of all of the LIBOR banks at this time, but maybe</b>  2       <b>Barclays was a higher risk bank. Maybe it should have</b>  3       <b>been posting a higher LIBOR.</b></p> <p>4       Q. Wouldn't it have required -- and this is Mr Storey. Was  5       he the Chairman of the FXMMC at that stage?</p> <p>6       A. <b>I think so. He was certainly on it. I think he may</b>  7       <b>have been the chair at that time, but I can't remember</b>  8       <b>exactly when he became chair.</b></p> <p>9       Q. All right. Turn over the page:</p> <p>10      "I personally don't believe that that's what's  11       actually keeping them lower than where they ought to be  12       and therefore accentuating or aggravating the  13       differentiation. There's no way on earth that we as  14       banks should go and talk to each other, for instance.  15       " Hmm, hmm.  16       "Well, I'll set it 10 higher if you do because  17       that's just as bad the other way round. We had quite  18       a long conversation with our money market guys this  19       morning before we decided where to set our dollar LIBORs  20       and dollar is the one that is most accentuated.  21       "Right.  22       "Sterling is much less of an issue but because  23       everybody is chasing dollar liquidity.  24       "Yes.  25       "That's where it's coming to a head. I'm sure</p>	<p>1       Q. He was clearly telling you about the market. He was  2       clearly telling you about potentially other banks.  3       I suggest he gave basis for an enquiry about other  4       banks. Did you follow it up?  5       A. <b>Our follow-up was to tell all of the banks to submit</b>  6       <b>accurate rates and I believe at or slightly after this</b>  7       <b>time -- I think a few days after this -- Angela Knight</b>  8       <b>went as far as to write to the Chairman or CEO of all of</b>  9       <b>the contributors banks to explain to them why they had</b>  10       <b>to submit accurate rates.</b>  11       Q. Look at the next document, please, JEX/030. We can take  12       this relatively quickly as we've seen part of it before.  13       At the bottom of that e-mail, Mr Ewan, is the starting  14       to receive more and more comments, the one you've looked  15       at already; okay?  16       I want to go to the top, please. Again, this is  17       Mark Thomasson:  18       "I would not agree that all currency LIBORs are  19       fixing artificially low, although the US dollar rates  20       have attracted much attention. In short, the market is  21       broken. There are no offers of reasonable market size  22       in the cash markets. This period has illustrated that  23       many panel members are not active in the cash markets  24       and will fix according to their perception of where they  25       think cash should be available to them or how the</p>
<p style="text-align: center;">Page 121</p> <p>1       you're aware.  2       "I mean, I would like to head this off before it  3       becomes an issue. I do think there is a -- there is  4       a way that we can, I mean, we can, can we, I'm quite  5       happy, for example, to write to all contributors and  6       say -- I mean, it's very difficult for me, you know,  7       there's no precedent of the BBA having done this, but  8       saying, 'Oi, you lot'.  9       "Yep, I did. I think some at the very least, if  10       only for internal and/or future external consumption,  11       something from you guys, a rec -- you know, the thing  12       about this is where is the enforcement of governance?  13       The answer is there isn't any because (i) there wasn't  14       needed to be and then (ii) how does a trade association  15       enforce on can't [is how it's written] on contributors."  16       He is, we think at this stage, the chair of the  17       FXMMC; yes?  18       A. <b>Hmm, hmm. Yes.</b>  19       Q. He is saying enforcement is your responsibility?  20       A. <b>I think that the action of enforcement is the</b>  21       <b>responsibility of the BBA so the act of enforcing</b>  22       <b>against a contributor bank is done by the BBA because</b>  23       <b>the BBA owns the rates, but the decision to enforce and</b>  24       <b>the form of the enforcement would be the decision of the</b>  25       <b>committee.</b></p>	<p style="text-align: center;">Page 123</p> <p>1       spreads against derivatives are trading."  2       "With regard to panel members, he talks about that.  3       I'm not going to take you through that.  4       "With reference to press articles, I feel you would  5       be well-placed to question the integrity of some of the  6       articles published in the recent months, in particular  7       the reporting of banks using the standing facilities  8       offered by the Bank of England has been far from  9       accurate. This type of misinformation creates a fear of  10       being seen to be out of line, the suggestion being that  11       fixing higher LIBORs demonstrates a need for cash."  12       We had seen the bottom half of the e-mail but this  13       is a new response to that original bottom. What do you  14       understand by how the spreads against derivatives are  15       trading at the end of that first paragraph?  16       A. <b>I think that is a reference to what would be permissible</b>  17       <b>type 1 behaviour. There is no cash. You have to do</b>  18       <b>something to try and fix your LIBOR. So you look at how</b>  19       <b>derivatives that have historically tracked LIBOR are</b>  20       <b>trading and you work out where your cash would be using</b>  21       <b>those levels.</b>  22       Q. You don't think that's a suggestion, because of the word  23       "or", looking at spreads against derivatives for LIBOR  24       fixing?  25       A. <b>I think that is a reference to permissible type 1</b></p>

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<p>1      behaviour.</p> <p>2    Q. Thank you.</p> <p>3    MR HAWES: My Lord, I'm just asked for an afternoon break,</p> <p>4       if that's a convenient time?</p> <p>5    MR JUSTICE COOKE: Yes, thank you. Five minutes, please,</p> <p>6       members of the jury.</p> <p>7    (3.21 pm)</p> <p>8       (Short break)</p> <p>9    (3.35 pm)</p> <p>10   MR HAWES: Can we have JEX/031, please. Mr Ewan, this is</p> <p>11   a further telephone call between you and Mr Storey on</p> <p>12   5 December. I think you have seen this before, haven't</p> <p>13   you?</p> <p>14   A. Yes.</p> <p>15   Q. Let's summarise it to this extent: there's introductions</p> <p>16   at the start and then towards the bottom of that page,</p> <p>17   this is Miles to you:</p> <p>18   "It sort of grumbled through the grapevine that --</p> <p>19   and I believe this to be a mixed message down the</p> <p>20   trenches, if you know what I mean, that the FSA has been</p> <p>21   communicating with people about LIBORs.</p> <p>22   "Right.</p> <p>23   "Has that filtered to you at all?</p> <p>24   "No.</p> <p>25   "I don't believe it to be the case and we saw the</p>	<p>1       [there's a slight distortion the tape] money markets is</p> <p>2       I heard somebody at Gulf International Bank rang me this</p> <p>3       morning and said LIBORs are too low. He says that</p> <p>4       a contributor bank offered to take cash from him at 10</p> <p>5       basis points above what they had been contributing.</p> <p>6       "Right.</p> <p>7       "And he didn't name the bank and I specifically</p> <p>8       asked him not to but that's not okay."</p> <p>9       Why did you specifically ask him not to name the</p> <p>10   bank?</p> <p>11   A. <b>I don't recall exactly, but I think it would have been</b></p> <p>12   <b>because I would not have known what my response or</b></p> <p>13   <b>responsibility should have been without speaking to my</b></p> <p>14   <b>management, the Foreign Exchange and Money Markets</b></p> <p>15   <b>Committee.</b></p> <p>16   Q. Forgive me, Mr Ewan. Someone from Gulf International</p> <p>17   Bank is phoning you to complain that LIBORs are too low</p> <p>18   and he's talking about a contributor bank. You don't</p> <p>19   need, do you, permission to ask which contributor bank</p> <p>20   he is talking about?</p> <p>21   A. <b>Yes, but my response is it must not happen.</b></p> <p>22   Q. It's a different question.</p> <p>23   A. <b>I accept that, but --</b></p> <p>24   Q. You don't need permission to ask which contributor bank</p> <p>25   he is talking about?</p>
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<p>1       FSA ourselves in person and they didn't raise the issue</p> <p>2       but I wondered if anyone -- anybody at anywhere else</p> <p>3       around your neck of the woods had raised it?</p> <p>4       "I'd only heard that. I've only heard it in</p> <p>5       connection with things that -- well, that might be</p> <p>6       interested and they could show interest, but nobody --</p> <p>7       I don't know of anybody at any bank who has said, 'Yes</p> <p>8       the FSA have spoken to me'."</p> <p>9       Pause there. That's in relation to LIBOR that we</p> <p>10   are talking about here, as opposed to anything else?</p> <p>11   A. <b>I would assume so.</b></p> <p>12   Q. Thank you.</p> <p>13   "Right. I know some people worry about it but</p> <p>14   I don't know that stuff. Worrying and thinking is one</p> <p>15   thing and (ii) FSA conversations are supposed to be</p> <p>16   confidential anyway" says Miles.</p> <p>17   You agree. He wondered if you had heard overtly and</p> <p>18   you say you hadn't heard anything.</p> <p>19   I want to just go over the page, please. There's</p> <p>20   discussion about rumours, how they go round very</p> <p>21   quickly. Then we come to this:</p> <p>22   "Yes, I mean [this is you], ah, yeah, that's all</p> <p>23   I've heard, is that it might be the case now what I did</p> <p>24   hear and I'm going to get back in touch with him before</p> <p>25   I exchange. I send another e-mail around before I check</p>	<p>1       A. <b>At the time I was very clear, as this phone call -- this</b></p> <p>2       <b>transcript says, that it can't happen. It must not</b></p> <p>3       <b>happen and the way that I felt that that should best</b></p> <p>4       <b>happen is by everybody behaving in appropriate -- in</b></p> <p>5       <b>line with what they had agreed to do, to quote the</b></p> <p>6       <b>definition to the best of their ability.</b></p> <p>7       Q. Let's break it down, Mr Ewan, shall we? At the time you</p> <p>8       have just said you were very clear that people should</p> <p>9       set the rate accurately; yes?</p> <p>10   A. Yes.</p> <p>11   Q. You have been told by a non-panel bank, which I assume</p> <p>12   Gulf International is; yes?</p> <p>13   A. Yes.</p> <p>14   Q. That they are aware of a contributor bank, namely one on</p> <p>15   the panel, who has offered to take cash from him at 10</p> <p>16   basis points above what they have contributed that day;</p> <p>17   yes?</p> <p>18   A. Yes.</p> <p>19   Q. You have agreed earlier that that type of activity would</p> <p>20   not be in accordance with the definition?</p> <p>21   A. Yes.</p> <p>22   Q. To ensure clarity of the rate and accuracy of the rate,</p> <p>23   as you are telling the jury, required you to ask which</p> <p>24   bank it was?</p> <p>25   A. <b>I disagree.</b></p>
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<p>1 Q. Because ...?</p> <p>2 A. <b>I believed then that the best way of making sure the</b>  <b>3 rates were accurate was for everybody to behave in line</b>  <b>4 with the definition.</b></p> <p>5 Q. How --</p> <p>6 A. <b>It was not --</b></p> <p>7 Q. Sorry --</p> <p>8 A. <b>It was not clear to me what I would be able to do with</b>  <b>9 the information, what the correct response was, but, as</b>  <b>10 you can see from what I said at the time, I believed it</b>  <b>11 was wrong.</b></p> <p>12 Q. It's a separate issue. My question is one about      13 investigation; all right? I'm not suggesting you say      14 here it's right. The transcript speaks for itself.      15 I want to understand whether any investigation was      16 undertaken. Is the short answer "no"?</p> <p>17 A. <b>I don't remember.</b></p> <p>18 Q. Were you nervous about a contributor bank being named,      19 given that they may well be sitting on the FXMMC?</p> <p>20 A. <b>Yes, that would have been of concern to me.</b></p> <p>21 Q. Why?</p> <p>22 A. <b>Because the BBA is a trade body that's supposed to act</b>  <b>23 in the best interests of its members.</b></p> <p>24 Q. A conflict of interest?</p> <p>25 A. <b>I don't know whether it's technically a conflict of</b></p>	<p>1 not, you needed to ask the question who? It's simple.</p> <p>2 Do we agree?</p> <p>3 A. <b>I've said that I don't -- I did not know how to respond</b>  <b>4 to that situation.</b></p> <p>5 Q. All right. Let's move on. Miles then says to you in      6 response:</p> <p>7 "Well that's going on. We know that's going on"      8 which is a reference to the variance between the LIBOR      9 postings and where people are taking cash in the market      10 that day, do you agree?</p> <p>11 A. <b>That's what Miles says.</b></p> <p>12 Q. You say, in fairness to you, as I just indicated:      13 "That must stop. It can't happen because that is      14 going to undermine the rates irredeemably quickly,      15 incredibly quickly.</p> <p>16 "That helps to contribute to lead me on the second      17 point about what feedback you have had from your note."      18 This is Miles.</p> <p>19 Now, you say, over the page:</p> <p>20 "I've only heard back from one member of the      21 committee who says that he wouldn't agree that the      22 currencies that all LIBORs are fixing artificially low.      23 The fact that market is broken, there are no offers of      24 reasonable size, panel members are not active in the      25 cash markets, won't affect according to their perception</p>
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<p>1 <b>interest but --</b></p> <p>2 Q. Never mind the technicalities.</p> <p>3 A. <b>But, yes, I agree there is a difficulty there because</b>  <b>4 the BBA is responsible, on the one hand, for ensuring</b>  <b>5 that the rates are accurate and, on the other hand, is</b>  <b>6 also responsible for looking after its members.</b></p> <p>7 Q. I'm not going to labour the point but you talk about      8 accuracy of the rate?</p> <p>9 A. <b>Yes.</b></p> <p>10 Q. Here was an opportunity to take a step to identify      11 a contributor bank from which you could have then      12 ensured the accuracy of the rate, but you didn't take      13 it?</p> <p>14 A. <b>That's not necessarily the case because all there is</b>  <b>15 there is a reported allegation from Gulf International</b>  <b>16 Bank that somebody -- who they may in fact not have been</b>  <b>17 prepared to name anyway -- was doing something. I mean,</b>  <b>18 there is an obvious assumption that the person from Gulf</b>  <b>19 International Bank is telling the truth.</b></p> <p>20 Q. "I specifically asked him not to ..."</p> <p>21 A. <b>Yes.</b></p> <p>22 Q. To get to the point whether there was any truth in the      23 allegation or not, you would have specifically needed to      24 have asked him, wouldn't you? To even start the process      25 of knowing whether this was just merely an allegation or</p>	<p>1 of where cash should be available to them, the cash --      2 because cash isn't available to them. I just marked      3 Thomas into RBS."</p> <p>4 Then there's a noise and then Miles says:      5 "Right, okay, so rather than, you know, in summary,      6 there's been one answer so that implies people, you      7 know, they're not too busy choosing not to necessarily      8 address the issue."</p> <p>9 You agree:      10 "I think it's going to need, having heard that this      11 morning, I need to write or I need to send another      12 message to be able to defend myself that I'm taking      13 action if I'm stood up by the FSA or some journalist or      14 something or a journalist or something."</p> <p>15 What did you mean by that?</p> <p>16 A. <b>Well, having made the point that I believe it is</b>  <b>17 absolutely wrong, if this is happening, for it to</b>  <b>18 happen, and I'm saying that as well as my belief that</b>  <b>19 it's wrong I need to demonstrate that the BBA is taking</b>  <b>20 action to make sure it doesn't happen again because</b>  <b>21 I wouldn't like to find myself in seven years hence</b>  <b>22 asking questions about the issue.</b></p> <p>23 Q. Well, if that is the case, why make the decision that      24 you made about the Gulf Bank?</p> <p>25 A. <b>Because, as I've said, I didn't have clear guidelines</b></p>
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<p>1   <b>about what I was supposed to do. As I have said,</b>      2   <b>I agree there is a tension between the two jobs of the</b>      3   <b>BBA, if you like, but both Miles and I agree it</b>      4   <b>shouldn't happen and we would like to do everything in</b>      5   <b>our powers to make sure that it doesn't.</b></p> <p>6   Q. Miles has said to you that, in light of your note, which      7   is a note you wanted to send out to contributors -- do      8   you remember the reference me saw earlier? -- people are      9   choosing not to necessarily address the issue. Is that      10   something that you found was the case?</p> <p>11   A. <b>I don't think we -- well, if it was, it was something</b>      12   <b>that was addressed very quickly because there were</b>      13   <b>follow-ups by me, by Angela Knight, with all of the</b>      14   <b>contributor banks so it was certainly something that</b>      15   <b>they had to address. Angela Knight wrote to the chief</b>      16   <b>executives or Chairman of all of the contributors banks</b>      17   <b>so there's not -- I don't really see what more the BBA</b>      18   <b>could have done. I mean, at the highest levels of the</b>      19   <b>bank they are aware that it's happening and we have</b>      20   <b>said, "This is not right". The BBA had no regulatory</b>      21   <b>power.</b></p> <p>22   Q. Forgive me, Mr Ewan, does that mean that you are      23   accepting, if this is about low-balling, you do now      24   accept this is not just a smoking gun, this is      25   happening?</p>	<p>1   Q. Well, he says it to you. You don't disagree with him.      2   A. <b>I don't --</b>      3   Q. Do you?      4   A. <b>I do not know whether I could have said at the time that</b>      5   <b>I was certain that it was happening. I know that I was</b>      6   <b>very concerned about it and I was trying to do my best</b>      7   <b>to make sure it wasn't happening.</b></p> <p>8   Q. In fairness to you, if we look at page 3 of that      9   transcript -- so let's not take it out of context -- he      10   says to you:      11        "We know that's going on."      12        Your response is:      13        "It's got to stop" in essence.      14        So, in fairness to you, that's precisely what you      15   were saying, but the point is you're not saying to him,      16   "What do you mean it's going on?" There was a received      17   wisdom at that time that you and the BBA knew that      18   low-balling was taking place?</p> <p>19   A. <b>I don't accept that.</b></p> <p>20   Q. All right. Let's look at JEX/032, please. I wonder if      21   we can just scroll to the bottom of that firstly. Thank      22   you. This is an e-mail from you toward the end of 2007      23   now, 7 December, subject, "LIBOR rates":      24        "All ..."      25        This is an internal BBA e-mail communication; yes?</p>
<p style="text-align: center;">Page 133</p> <p>1   A. <b>Miles thinks that it's something that is seen in the</b>      2   <b>market. I don't know, because I don't know exactly</b>      3   <b>where every bank is taking cash, but I -- the point</b>      4   <b>surely is that we're very clear that whether it's</b>      5   <b>provable, it should not be happening.</b></p> <p>6   Q. Put that to one side for one moment because, as      7   I understand, and correct me if I'm wrong, your evidence      8   you have said to the jury there were smoking guns, there      9   were lots of complaints --</p> <p>10   A. <b>Those aren't smoking guns, those are just complaints.</b></p> <p>11   Q. Right, but ultimately you at that stage didn't recognise      12   low-balling. Have I misunderstood your evidence?</p> <p>13   A. <b>That --</b></p> <p>14   Q. At that stage you didn't recognise that there was      15   low-balling taking place?</p> <p>16   A. <b>I think at around that time, and I can't remember</b>      17   <b>exactly what I thought on the day, but I was extremely</b>      18   <b>worried that it might be happening and -- which is why</b>      19   <b>I took the actions that we've just been describing.</b></p> <p>20   Q. Yes. I want to concentrate on your state of knowledge      21   at that time because here's Mr Storey, chair of your      22   FX Committee, and you sharing a conversation where he      23   says, "Well, we know, mutual, that this is happening".      24   Common wisdom between the both of you.</p> <p>25   A. <b>I don't accept that.</b></p>	<p style="text-align: center;">Page 135</p> <p>1   A. <b>Yes.</b></p> <p>2   Q. Thank you.</p> <p>3   ... we have to keep a close eye on how the rates      4   are perceived at the moment. There is more sustained      5   stress in the credit market than there has been seen for      6   a very long time. The BBA LIBOR is going to come in for      7   criticism whatever we do. Hopefully this will be      8   a short-term issue which will peak in the run-up to the      9   New Year. Between now and year-end we will see more      10   banks announcing their results and their plans for      11   managing exposure to subprime."</p> <p>12   That's a reference, is it, Mr Ewan, subprime,      13   mortgages and their exposure to debt?</p> <p>14   A. <b>Yes.</b></p> <p>15   Q. "On this front so far all the banks look like they're      16   okay, unless there are further skeletons in the      17   cupboards or special investment vehicles that we don't      18   know about. Paralysis of money markets will only get      19   worse until year-end. The issue is how to manage      20   perception of the rates partially in the media but more      21   importantly from my point of view how they are perceived      22   by the bank, the FSA and the treasury. I am happy we      23   can deal with the further instances of slanted reporting      24   in the pink press but if these stories are launched on      25   the back of questions from the government or regulator,</p>

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<p>1 that will be harder to answer."</p> <p>2 Why would those questions have been harder to</p> <p>3 answer?</p> <p>4 <b>A. So at this time there were lots of people talking and</b></p> <p>5 <b>writing about LIBOR and these people were writing both</b></p> <p>6 <b>that the rates were too high and that they're too low,</b></p> <p>7 <b>which additionally was an issue because one of those</b></p> <p>8 <b>statements might be right but they can't both be right,</b></p> <p>9 <b>but they're both criticisms which we felt at the BBA we</b></p> <p>10 <b>had to deal with.</b></p> <p>11 Now, if a journalist comes to the BBA and says,</p> <p>12 "I believe that the rates are too high or too low</p> <p>13 because such and such a person has told me so", the one</p> <p>14 response to that is, "Well, that's just the opinion of</p> <p>15 such and such a person and here are three other guys</p> <p>16 that think the reverse", whereas if the questions come</p> <p>17 from the government or a regulator you immediately get</p> <p>18 a follow-up question which is, "Are you saying that the</p> <p>19 regulator's wrong or the government's wrong?" and that's</p> <p>20 a more -- that's a bigger issue.</p> <p>21 Q. Well, it's not a bigger issue. You have described it as</p> <p>22 harder to answer.</p> <p>23 <b>A. Yes.</b></p> <p>24 Q. Because it concerns, does it, the accuracy of the rate?</p> <p>25 <b>A. Potentially, yes.</b></p>	<p>1 <b>A. I can't remember exactly, but I would imagine that is</b></p> <p>2 <b>a lighthearted illusion to Ms Knight's rather forthright</b></p> <p>3 <b>style.</b></p> <p>4 Q. Was it a frequent occurrence that you would get in the</p> <p>5 head of treasuries from the various panel banks to "give</p> <p>6 them a kicking"?</p> <p>7 <b>A. No.</b></p> <p>8 Q. So may I ask why is there a difficulty in recollecting</p> <p>9 these particular events?</p> <p>10 <b>A. I don't think I said there was a difficulty in</b></p> <p>11 <b>recollecting it. You asked me for context and I gave</b></p> <p>12 <b>you the context, I believe.</b></p> <p>13 Q. All right. Scroll up the e-mail, please. Ross Barrett</p> <p>14 back to you:</p> <p>15 "Tin hats on then."</p> <p>16 Were you present at that meeting that Angela Knight</p> <p>17 had with the head of treasuries?</p> <p>18 <b>A. I don't recall. Probably. I think I was travelling for</b></p> <p>19 <b>business and/or around then. I don't recall whether</b></p> <p>20 <b>I actually attended it. I can't say for sure.</b></p> <p>21 Q. Thank you. Let's look, please, at JEX/033. I am sorry,</p> <p>22 that's a wrong reference on my part. JEX/034, sorry.</p> <p>23 Just allow me one moment, please, Mr Ewan. (Pause)</p> <p>24 Can we scroll to the bottom of the e-mail. There's</p> <p>25 a lot of headers on this one so just scroll. Thank you,</p>
<p style="text-align: center;">Page 137</p> <p>1 Q. And the way in which banks were operating at that stage</p> <p>2 in the market to fix their LIBORs which you knew about.</p> <p>3 Isn't that why you've written it's harder to answer; in</p> <p>4 other words, in your evidence, Mr Ewan, are you saying</p> <p>5 that the questions from government or regulator would</p> <p>6 be -- my words -- more piercing?</p> <p>7 <b>A. Well, they might be, but that's, I don't think, my</b></p> <p>8 <b>point. My point is that a journalist would feel they</b></p> <p>9 <b>had a stronger story if they can write FSA are asking</b></p> <p>10 <b>questions about LIBOR, rather than some random bloke</b></p> <p>11 <b>asking questions about LIBOR.</b></p> <p>12 Q. All right. Let's scroll up the e-mail then, please.</p> <p>13 Ross Barrett is who?</p> <p>14 <b>A. He was a colleague who --</b></p> <p>15 Q. Can you scroll down, please?</p> <p>16 <b>A. -- he worked for Alex Merriman, like I did, but he</b></p> <p>17 <b>wasn't really involved in anything to do with LIBOR.</b></p> <p>18 Q. Internal BBA though?</p> <p>19 <b>A. Internal BBA colleague, yes.</b></p> <p>20 Q. Thank you. The next e-mail, you said, "Yes, certainly"</p> <p>21 in response to that. He says:</p> <p>22 "We'll chat on Monday. It's all going off. Angela</p> <p>23 has asked me to get in the head of treasury for all the</p> <p>24 contributor banks to give them a kicking."</p> <p>25 What does that mean, if that's not plain?</p>	<p style="text-align: center;">Page 139</p> <p>1 that's fine. So you're writing an e-mail to those</p> <p>2 individuals we'll see above. I think you have the hard</p> <p>3 copy but we'll look at them in a minute, saying:</p> <p>4 "Thank you very much for your reply. Responses</p> <p>5 favour a meeting."</p> <p>6 So in essence this is just a general e-mail to these</p> <p>7 individuals calling -- go down slightly. You see the</p> <p>8 original e-mail that you have called to the</p> <p>9 contributors:</p> <p>10 "As you know, accurate BBA LIBOR fixings are central</p> <p>11 to the ongoing health of the markets and so at this time</p> <p>12 the heightened stress and scrutiny more than ever is</p> <p>13 vital that the BBA LIBOR rate setting process is seen to</p> <p>14 be transparent and robust. It has been increasingly</p> <p>15 prominent comment in the market and media on the rates</p> <p>16 and so I would like to invite you to a meeting chaired</p> <p>17 by our chief executive Angela Knight to discuss openly</p> <p>18 the integrity of the fixings and how to ensure their</p> <p>19 accuracy in the future."</p> <p>20 Two issues arise from that. Integrity and accuracy,</p> <p>21 both presumably, therefore, Mr Ewan, had been called</p> <p>22 into question by this stage?</p> <p>23 <b>A. Yes.</b></p> <p>24 Q. You then set out the provisions for the conference call.</p> <p>25 We won't read that into the transcript. Then we scroll</p>

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<p>1 up, which is the e-mail we've just been looking at. You  2 say:</p> <p>3 "Balance of responses favour the meeting on  4 11 December."</p> <p>5 Then I think Jon Wood, if we go above that, please,  6 that's to the FXMMC and members of the BBA, is that  7 right, that was sent to? If you look on screen,  8 Mr Ewan, that may assist you.</p> <p>9 <b>A. So the question is this --</b></p> <p>10 Q. Those are the FXMMC and the BBA members that were  11 invited to the meeting?</p> <p>12 <b>A. I think that's correct.</b></p> <p>13 Q. Thank you. Can we scroll up, please. Jon Wood then  14 e-mails you on 11 December:</p> <p>15 "Can you enlighten me on conclusions. For your  16 information we are seeing the first signs of easing  17 today. If we can get a bit of momentum going it will be  18 as well not to break it."</p> <p>19 Jon we know became, but not at this stage, the chair  20 of the FXMMC, is that right?</p> <p>21 <b>A. Correct.</b></p> <p>22 Q. Scroll up. Your response to him:</p> <p>23 "Jon, no conclusions really, more of a tour de table  24 where everybody vented their pain. All agreed that we  25 are seeing a high liquidity premium in the emergence of</p>	<p>1 say, "<b>It happens but it's not us" or they would not name</b>  2 <b>names.</b></p> <p>3 Q. Pause, because the context of this meeting is the tin  4 hats meeting; all right? Ms Knight internally is, to  5 use the colloquial, going to give them a kicking. It's  6 about integrity and it's about accuracy. Were you told  7 that the banks were low-balling?</p> <p>8 <b>A. I can't remember if that was -- that happened at that</b>  9 <b>meeting.</b></p> <p>10 Q. Because in the context in which meeting was called I'm  11 assuming, but correct me if I'm wrong, that maybe the  12 first response of, "We're not doing it" wouldn't  13 necessarily have been accepted, would it, because it's  14 not consistent with the tenor internally within the BBA?</p> <p>15 <b>A. I think I'm fairly happy to state that Ross and I were</b>  16 <b>at the time fairly junior members of staff who observed</b>  17 <b>Angela's usually extremely frank and forthright style.</b></p> <p>18 Q. So --</p> <p>19 <b>A. And we had both been on the receiving end of it.</b></p> <p>20 Q. So if she had a very frank and forthright style and this  21 was about integrity and accuracy, she's not going to  22 effectively let them off the hook, is she?</p> <p>23 <b>A. I think she was insistent that banks should be posting</b>  24 <b>LIBORs that are as accurate as possible in a frozen</b>  25 <b>market.</b></p>
<p>Page 141</p> <p>1 two or even three tier market where you're ability to  2 raise funds depends on your name. All also observed  3 that right now posting a high LIBOR rate is interpreted  4 by the market as meaning that you have a funding problem  5 so no one will do so as it's a self-fulfilling prophecy.  6 The one concrete conclusion was to get the FX &amp; MM  7 committee to meet in mid-January when the year-end has  8 passed and when we're hopefully in calmer waters to  9 think about the definition of LIBOR. It clearly isn't  10 the rate at which banks lend to each other. It seems  11 that view is that the rate really indicates where you  12 can access liquidity and there might be a better way of  13 defining this."</p> <p>14 Now, two issues that arise from that. Posting  15 a high LIBOR rate is interpreted by the market as  16 meaning you have a funding problem so it's in essence  17 a self-fulfilling prophecy. That is reflective, is it,  18 Mr Ewan, of what you were being told at that meeting?</p> <p>19 <b>A. Yes.</b></p> <p>20 Q. Which is low-balling?</p> <p>21 <b>A. Yes.</b></p> <p>22 Q. Were you told by the banks that were low-balling they  23 were doing it?</p> <p>24 <b>A. As ever, in these situations you would find that</b>  25 <b>either -- when asked the question banks would either</b></p>	<p>Page 143</p> <p>1 Q. In terms of integrity and accuracy, were derivatives  2 discussed?</p> <p>3 <b>A. I don't recall.</b></p> <p>4 Q. Can you assist us, please, with the last paragraph. You  5 clearly have identified to Mr Wood that in early 2008,  6 mid-January, you're going to think about the definition;  7 yes?</p> <p>8 <b>A. Yes.</b></p> <p>9 Q. "It clearly isn't the rate at which banks lend to each  10 other. It seems that view is that the rate really  11 indicates where you can access liquidity."</p> <p>12 What does that mean?</p> <p>13 <b>A. I think that is -- well, it's not the rate at which the</b>  14 <b>banks lend to each other. I think that's probably</b>  15 <b>a reference to the then governor of the Bank of</b>  16 <b>England's pithy comment that LIBOR is the rate at which</b>  17 <b>banks don't lend to each other. It's a reference to the</b>  18 <b>fact that there's no lending activity in the market.</b></p> <p>19 Q. So that was the governor?</p> <p>20 <b>A. That was what the governor said at one point, yes.</b></p> <p>21 Q. So the governor of the Bank of England has misstated the  22 definition?</p> <p>23 <b>A. I think the governor of the Bank of England was</b>  24 <b>attempting a rare joke.</b></p> <p>25 Q. But getting the definition wrong?</p>

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<p>1 A. He was making a joke.</p> <p>2 Q. But it required you to re-think about the definition at</p> <p>3 least, if it was a joke?</p> <p>4 A. Well, no, the governor's joke didn't, but the meeting</p> <p>5 where, in seriousness, our contributor banks told us</p> <p>6 that LIBOR is a rate for cash and there is not cash</p> <p>7 transacting in the market, so if there isn't cash</p> <p>8 transacting in the market and your definition is for</p> <p>9 cash transacting in the market, there is a problem with</p> <p>10 the definition.</p> <p>11 Q. But your type 1 activity would accommodate that?</p> <p>12 A. Yes, it would.</p> <p>13 Q. So it --</p> <p>14 A. But it's not -- sorry to interrupt. Yes, it would, but</p> <p>15 it would be better for everybody if, rather than having</p> <p>16 to rely on type 1 activity, it was possible to create</p> <p>17 a rate that didn't require that.</p> <p>18 Q. Did you contemplate -- I know it didn't change --</p> <p>19 changing the definition to something other than cash?</p> <p>20 A. Yes.</p> <p>21 Q. To reflect the difficulties in the market in the</p> <p>22 interbank cash market?</p> <p>23 A. Yes. I think that was -- whether we'll come to it or</p> <p>24 not I don't know, but that was one of the central planks</p> <p>25 of the consultation that took place in early 2008.</p>	<p>1 chaired by AK is Angela Knight, with a group of LIBOR</p> <p>2 contributors.</p> <p>3 Q. Is this the Angela Knight meeting?</p> <p>4 A. It may very well be, yes.</p> <p>5 Q. Right. I'm afraid you're going to have to help me with</p> <p>6 your hand. Is that "cross currency swaps spreads very</p> <p>7 wide"?</p> <p>8 A. Yes.</p> <p>9 Q. "Term cash market doesn't exist"?</p> <p>10 A. Yes.</p> <p>11 Q. That meaning as we've discussed?</p> <p>12 A. That at longer dates, like six months, 12 months, it's</p> <p>13 very difficult for banks to borrow cash.</p> <p>14 Q. Then I'm afraid below that, with the next hash, what</p> <p>15 does that say?</p> <p>16 A. "Lowings" which would be a reference to Mark Lowings who</p> <p>17 was a contributor but I don't recall from which bank,</p> <p>18 and it says:</p> <p>19 "LIBOR is very relevant because 90 per cent of all</p> <p>20 internal business is priced off LIBOR."</p> <p>21 Q. What did you -- obviously that's your note, but</p> <p>22 90 per cent of all internal business priced off LIBOR,</p> <p>23 is that a reference to treasury functions within a bank?</p> <p>24 A. I would assume so.</p> <p>25 Q. Thank you. The next entry, is that --</p>
<p style="text-align: center;">Page 145</p>	<p style="text-align: center;">Page 147</p>

1 Q. I'm going to take you, please, to JEX/035. Now, you may  
 2 need to assist us, Mr Ewan. Firstly, is that your  
 3 handwriting?

4 A. Yes.

5 Q. So now this is one of the notes that we have of one of  
 6 the meetings. You dated it at the top right-hand  
 7 corner, is that accurate? Is that your hand?

8 A. I think, yes.

9 Q. Can you help us with this. So top left-hand corner, is  
 10 this a meeting internally or is this a meeting with the  
 11 FXMMC?

12 A. It's neither because there are people who are external  
 13 to the BBA but there are people who I don't recognise as  
 14 being Foreign Exchange and Money Markets Committee  
 15 members, like Adrian Spain, Nick van Overstraten that  
 16 looks like.

17 Q. So can you identify from the -- so Miles appears to be  
 18 there. Is that Miles Storey?

19 A. Yes, I would assume so.

20 Q. Can you identify from the participants in what looks to  
 21 be some on the telephone -- I think there's a little  
 22 legend at the top "on phone" -- what the purpose of the  
 23 meeting was?

24 A. Without completely reviewing this, no, but I would  
 25 assume it's a meeting to discuss LIBOR which was being

1 A. "Differential between derivatives and cash market."

2 Q. Meaning ...?

3 A. Well, I assumed means that they price at different

4 levels which is perhaps wholly understandable.

5 Unfortunately I haven't recorded precisely which

6 derivatives he was discussing.

7 Q. The next entry, is that "FX forwards normally arb

8 [arbitrage] out"?

9 A. Yes.

10 Q. "But not happening at the moment."

11 What does that mean?

12 A. Usually I think what this is a reference to is in theory

13 in a perfect market, where there's plenty of liquidity

14 and nobody is worried about credit, you should be able

15 to, let's say, borrow cash in dollars at whatever the

16 rate is, say 5 per cent, and then you should be able to

17 borrow cash in another currency, perhaps euros, and then

18 do foreign exchange swap into dollars and the two should

19 come out at the same. There should be no advantage or

20 disadvantage in those transactions. They should in

21 effect look the same.

22 Q. Is it a way in which one can get implied level of

23 funding for your LIBOR submission?

24 A. It is something that you can use as colour for your

25 LIBOR. It's market information, but it should not be

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<p>1      <b>how you set your LIBOR.</b></p> <p>2    Q. Next, does it say -- correct me if I'm wrong:</p> <p>3       "Some banks can still attract cash, depends on your</p> <p>4       name. There is no point in one contrib post"?</p> <p>5    A. <b>One contributor posting 4.95 and the other 5.35 as it</b></p> <p>6       <b>dilutes the credibility of LIBOR."</b></p> <p>7    Q. Well, that's not in accordance with the definition?</p> <p>8    MR JUSTICE COOKE: What isn't?</p> <p>9    MR HAWES: The comment that has been made in the note.</p> <p>10   A. <b>Well, first of all, that is reportage of one person at</b></p> <p>11       <b>this meeting and their viewpoint and there's nothing in</b></p> <p>12       <b>there that's a problem with the definition of LIBOR. If</b></p> <p>13       <b>one contributor can borrow at 4.95 and the other has to</b></p> <p>14       <b>pay 5.35 if that's the way that market is discriminating</b></p> <p>15       <b>between those two banks, that's just fine.</b></p> <p>16   Q. Isn't he saying there is no point in one contributing</p> <p>17       bank posting one figure and another posting another</p> <p>18       because it dilutes the credibility of LIBOR?</p> <p>19   A. <b>Whoever this person is, it is their view that if a bank</b></p> <p>20       <b>posts one -- yes, posts 4.95 and the other posts 5.35,</b></p> <p>21       <b>it dilutes the credibility of LIBOR and I think, as we</b></p> <p>22       <b>will come to see, if we look at what happens</b></p> <p>23       <b>through 2008, in fact banks post considerably wider</b></p> <p>24       <b>spreads between the lowest and the highest because</b></p> <p>25       <b>that's an effect of the market and it's perfectly</b></p> <p style="text-align: center;">Page 149</p>	<p>1    A. <b>Yes.</b></p> <p>2    Q. "Due to ... ", sorry, I can't read your writing?</p> <p>3    A. <b>I think that says:</b></p> <p>4       <b>"Due to desire in Europe for dollars."</b></p> <p>5    Q. "RBS US banks have access to dollars but will not go</p> <p>6       offshore."</p> <p>7       Correct me if I'm wrong, is that a reference to the</p> <p>8       difference between US dollars and availability for panel</p> <p>9       banks that are American and US European dollars for</p> <p>10       non-American names?</p> <p>11   A. <b>That might be what that's a reference to, but you're not</b></p> <p>12       <b>supposed to -- you're not supposed to, in line with the</b></p> <p>13       <b>definition, quote the rate at which you can borrow</b></p> <p>14       <b>dollars in the US.</b></p> <p>15   Q. Because it's a London rate?</p> <p>16   A. <b>Because it's a London rate. Nevertheless, if you are --</b></p> <p>17       <b>at the moment LIBORs are basically all about how risky</b></p> <p>18       <b>you are. So the rate at which people will lend to you</b></p> <p>19       <b>is based on how risky you are. Now, if whoever is</b></p> <p>20       <b>potentially lending knows that you as a bank can, as</b></p> <p>21       <b>a bank, access US dollars in the US, you're less risky</b></p> <p>22       <b>so you might quite legitimately pick up dollars in</b></p> <p>23       <b>London at a slightly lower rate and there's nothing</b></p> <p>24       <b>problematic with that.</b></p> <p>25   Q. Thank you.</p> <p style="text-align: center;">Page 151</p>
<p>1      <b>consistent with the definition. It may just be that at</b></p> <p>2      <b>this point whoever it is either hasn't come to terms</b></p> <p>3      <b>with or just doesn't like the cash markets.</b></p> <p>4    Q. Well, in the narrow confines in which you have described</p> <p>5       it just now, whoever has spoken there is saying one bank</p> <p>6       puts in one rate, another puts in another rate and the</p> <p>7       variance between the two would undermine the credibility</p> <p>8       of LIBOR. That's what that note says?</p> <p>9    A. <b>That's what that person at that time said, yes, but</b></p> <p>10       <b>there's no -- there is nothing that is wrong with that.</b></p> <p>11   Q. So one bank can have regard to another bank's rate?</p> <p>12   A. <b>No.</b></p> <p>13   Q. How would it otherwise then dilute the credibility of</p> <p>14       LIBOR?</p> <p>15   A. <b>I don't know. In my view I think the fact that in</b></p> <p>16       <b>a stressed market if one bank is putting in a rate</b></p> <p>17       <b>that's significantly different to another bank, it</b></p> <p>18       <b>actually underlines the credibility of LIBOR because</b></p> <p>19       <b>LIBOR is reflecting a very tiered market.</b></p> <p>20   Q. Exactly. This -- exactly, and this quote that you have</p> <p>21       recorded is contradicting that that you've just said?</p> <p>22   A. <b>Well, that's the view of one person at the meeting.</b></p> <p>23   Q. Thank you. The next line:</p> <p>24       "Dollar LIBOR is most out of line."</p> <p>25       Is that what that says?</p> <p style="text-align: center;">Page 150</p>	<p>1       "Miles ..."</p> <p>2       The next entry, can you read that to us?</p> <p>3    A. <b>You can't post a high LIBOR as the market will assume</b></p> <p>4       <b>you have a funding problem. You should post your real</b></p> <p>5       <b>rates."</b></p> <p>6       So that reflects the conversation that you had had with</p> <p>7       him on the telephone some time before; in other words,</p> <p>8       (i) here you agree you should post your real rates and</p> <p>9       he's saying, "We are"?</p> <p>10   A. <b>Hmm, hmm.</b></p> <p>11   Q. "(ii) others are not"?</p> <p>12   A. <b>Well, I think he's discussing what Barclays were</b></p> <p>13       <b>perceived to have happened to them earlier in the year,</b></p> <p>14       <b>which is that they put in a high LIBOR rate and at the</b></p> <p>15       <b>time they attracted some comment from the market saying,</b></p> <p>16       <b>"I wonder if Barclays has a problem?" but he also says,</b></p> <p>17       <b>"You should post your real rates".</b></p> <p>18   Q. Can you read the next entry, please?</p> <p>19   A. <b>"Tony Miller [presumably the missing word is 'said'] but</b></p> <p>20       <b>you have to have a predictable rate or people can't use</b></p> <p>21       <b>a LIBOR curve."</b></p> <p>22   Q. Carry on.</p> <p>23   A. <b>"This leads to a suggestion that derivative traders need</b></p> <p>24       <b>a derivative rate."</b></p> <p>25   Q. Then ...?</p> <p style="text-align: center;">Page 152</p>

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<p>1 A. "Look to the OIS rate?"</p> <p>2 Q. What did you understand that to be a reference to?</p> <p>3 A. I think that is a reference to a conversation that</p> <p>4 really took shape throughout 2008 which is can LIBOR,</p> <p>5 which is used for such a huge number of purposes by</p> <p>6 people all around the world, really be fit for purpose?</p> <p>7 Should there be rates that are specifically created for</p> <p>8 this person to do this and that person to do that?</p> <p>9 Q. Now, others can ask you about other aspects of your</p> <p>10 note. I just want to take you over the page, please.</p> <p>11 Just below "all due to one month in dollar", do you see</p> <p>12 at the bottom there:</p> <p>13 "Broker allegedly..."</p> <p>14 Can you help us with what that says there, please.</p> <p>15 A. Broker allegedly told a bank their line of credit would</p> <p>16 be removed if they didn't indicate rates lower."</p> <p>17 Q. What's that a reference to?</p> <p>18 A. That would seem to be somebody saying that allegedly</p> <p>19 a broker has told a bank that they would have to show</p> <p>20 lower rates, otherwise their line of credit -- their</p> <p>21 ability to borrow from somebody would be taken away.</p> <p>22 Q. Thank you very much. I just want to briefly now show</p> <p>23 you very quickly an e-mail which is JEX/036, just to</p> <p>24 reference a date. It's the very top, Mr Ewan. This is</p> <p>25 when Mr Curtler, can you confirm, becomes part of the</p>	<p>1 MR JUSTICE COOKE: It comes from America.</p> <p>2 MR HAWES: It does. If you scroll up, I think that puts it</p> <p>3 beyond doubt.</p> <p>4 MR JUSTICE COOKE: Correct.</p> <p>5 MR HAWES: But it's a sequence of e-mails. My question</p> <p>6 really for showing you this is the following: you were</p> <p>7 starting to be responsible for the underlying drafting</p> <p>8 of the document that the jury have in their jury bundles</p> <p>9 at A6A, which is the document we've looked at; yes?</p> <p>10 A. Yes.</p> <p>11 Q. Who started that draft with you? Would you have all the</p> <p>12 responsibility of that on your own or would others have</p> <p>13 contributed to it?</p> <p>14 A. I don't recall who first put pen to paper, but I do</p> <p>15 recall that that document went through perhaps dozens of</p> <p>16 drafts and that there were a lot of people involved in</p> <p>17 doing drafts and being asked to give their opinions and</p> <p>18 views in order to include them in the document.</p> <p>19 Q. The jury have heard a little evidence about this</p> <p>20 already. Were you aware -- well, did you know that the</p> <p>21 Bank of England and the Financial Services Authority, as</p> <p>22 then were, did not want to be publicly associated with</p> <p>23 the document?</p> <p>24 A. Yes, I did.</p> <p>25 Q. Were you aware that the Bank of England regarded the</p>
<p style="text-align: center;">Page 153</p>	<p style="text-align: center;">Page 155</p>

  

<p>1 FXMMC committee on 12 December, or about then, 2007?</p> <p>2 A. Yes.</p> <p>3 Q. Thank you.</p> <p>4 JEX/039, please. This is material that I think you</p> <p>5 have been shown but I just want to confirm whether you</p> <p>6 saw it at the time or not. The e-mail is towards the</p> <p>7 bottom. I wonder if we can just scroll down, please.</p> <p>8 It's not copied immediately to you but it comes from the</p> <p>9 Federal Reserve. Did you see that at the time?</p> <p>10 A. I don't remember. I think it would be extremely unusual</p> <p>11 if I had been. That appears to be an e-mail from the</p> <p>12 New York Fed, an American -- part of the American</p> <p>13 Central Bank, to the Bank of England.</p> <p>14 Q. It's talking about draft documentation now in March</p> <p>15 of 2008 produced by the BBA?</p> <p>16 A. Yes.</p> <p>17 Q. Would this have been the documentation that ultimately</p> <p>18 resulted in the "Understanding and construction and</p> <p>19 operation of LIBOR. Strengthening for the future"</p> <p>20 in June 2008?</p> <p>21 A. I think that's likely.</p> <p>22 Q. Which the jury have and we'll look at in a while.</p> <p>23 MR JUSTICE COOKE: So is that dating English dating or</p> <p>24 American dating?</p> <p>25 MR HAWES: Well, I think --</p>	<p>1 document as drafted as being inadequate?</p> <p>2 A. Well, I think that entirely depends on which draft</p> <p>3 you're talking about because I think that document went</p> <p>4 through an awful lot of forms in the, let us say, three</p> <p>5 months that it took us to get it into its final shape</p> <p>6 and I believe that the New York Fed and the FSA and the</p> <p>7 Bank of England and various other official bodies were</p> <p>8 happy with the final draft that was released.</p> <p>9 Q. But didn't want to be publicly associated with it?</p> <p>10 A. No, they did not.</p> <p>11 Q. That touches, I think, we agree, Mr Ewan, on that</p> <p>12 tension between them not wanting to engage with LIBOR</p> <p>13 but requiring you to try and look after it?</p> <p>14 A. I think obviously you would need to speak to the Fed or</p> <p>15 the Bank of England, but I believe that their view was</p> <p>16 twofold. The first was it's a market rate and it's up</p> <p>17 to the markets to fix the issue and I think the second</p> <p>18 viewpoint was it would be very difficult for them to put</p> <p>19 their name to a paper on LIBOR because if they did that,</p> <p>20 they recognised that it would give the paper more weight</p> <p>21 and everybody else would immediately ring them up and</p> <p>22 say, "You've given LIBOR your endorsement, can you</p> <p>23 please endorse my rate, my index?"</p> <p>24 Q. You had been present at Bank of England meetings, for</p> <p>25 the Money Markets meeting in particular. I just want to</p>
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1 pose a contrary position to you for your comment,  
 2 please. Was there reticence about association with the  
 3 rate because of accuracy?  
 4 A. Well, you're asking me to speculate about this.  
 5 Q. Was that ever expressed to you? I don't want you to  
 6 speculate. Was it expressed to you?  
 7 A. I don't believe anybody from the official sector ever  
 8 said that to me, so whether it was the bank or the Fed  
 9 or the Swiss National Bank or whoever.  
 10 MR HAWES: Right. I wonder if that's an appropriate moment,  
 11 my Lord?  
 12 MR JUSTICE COOKE: Yes.  
 13 MR HAWES: Thank you.  
 14 MR JUSTICE COOKE: Thank you very much. 10 o'clock tomorrow  
 15 morning, please, members of the jury. Thank you very  
 16 much indeed.  
 17 (In the absence of the jury)  
 18 MR HAWES: Just in terms of time, as your Lordship knows  
 19 we're going to review the list of documents to come  
 20 tonight and will try and cut those down so I'll finish  
 21 tomorrow.  
 22 MR JUSTICE COOKE: Right. Thank you.  
 23 (4.35 pm)  
 24 (The court adjourned until  
 25 10.00 am on Tuesday, 9 June 2015)

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<p>1 and early 2008 that the level of comments were      2 increasing, and the issue that I had was that there were      3 an awful lot of people commenting about LIBOR, and      4 I thought that many of these were from people who just      5 didn't like the level of the rates.</p> <p>6 Q. If we divide them, you, as we saw yesterday, had      7 received comments from individuals who were not panel      8 bank; yes?</p> <p>9 A. Yes.</p> <p>10 Q. Who you have described as not liking the rate; yes?</p> <p>11 A. Yes.</p> <p>12 Q. That you had also received comments from members of the      13 FXMMC to the same effect, hadn't you?</p> <p>14 A. We had received comments that they thought it happened,      15 but, as we've explored at length, we didn't have      16 a smoking gun.</p> <p>17 Q. The note continues:      18 "This is of concern to the BBA because if true this      19 could very easily and very rapidly wreck the reputation      20 of the rates and damage the reputation of the BBA as      21 a whole, especially in these times of heightened      22 scrutiny of banks and concern about the money markets.      23 If the reputation of LIBOR is damaged it will not do the      24 wholesale interbank market any good and will encourage      25 participants to look for an alternative benchmark which</p>	<p>1 A. That is me commenting on the comments that I have      2 received from users or other people in the market. The      3 reason I don't -- and that is why it is in quotation      4 marks because it's not something that I personally have      5 said it is reported commentary from other people who      6 have said it to me.</p> <p>7 Q. It had been said, as we looked at on a number of      8 occasions yesterday, more than once, however, hadn't it?</p> <p>9 A. Yes.</p> <p>10 Q. In 2007 you were, if I may generalise it, being told      11 this quite frequently?</p> <p>12 A. Yes, we were also being told quite frequently that the      13 rates were accurate.</p> <p>14 Q. Number 2:      15 "Banks quoting LIBOR use it as the basis for their      16 internal and external funding rates. It will cost      17 a bank's treasury money if it increases its rates."      18 What does the second sentence mean?</p> <p>19 A. Well, I think it's -- the meaning is fairly clear.      20 However, I haven't since reflected on that sentence and      21 I'm not sure if it is in fact accurate.</p> <p>22 Q. Well, you wrote this at the time; yes?</p> <p>23 A. Yes.</p> <p>24 Q. You must have been satisfied about its accuracy at the      25 time because you are writing it to your CEO; yes?</p>
<p style="text-align: center;">Page 5</p> <p>1 would compromise a rapidly growing revenue stream for      2 the BBA."</p> <p>3 One of the issues I touched on with you yesterday is      4 there was a tension within the BBA, wasn't there, about      5 losing LIBOR commercially?</p> <p>6 A. That was vastly outweighed by our concerns that -- about      7 ensuring that the rate was accurate.</p> <p>8 Q. It might have been outweighed by your concerns of the      9 accuracy of the rate, but it was sufficient, wasn't it      10 Mr Ewan, for you to note it fairly quickly in the issues      11 document that we're looking at.</p> <p>12 A. Well, it comes below my concerns about the accuracy of      13 the rate. Yes, the BBA was making a proportion of its      14 revenue from LIBOR, but it was not the main way that the      15 BBA was funded, it was one of the ways in which the BBA      16 made income.</p> <p>17 Q. The note continues:      18 "Banks will not be easily persuaded to alter their      19 quoting policy because (1) if a contributor suddenly      20 quotes a higher or 'more realistic' rate it will      21 immediately draw attention to itself and potentially      22 start rumours about liquidity or solvency problems at      23 the bank. No one bank will break ranks."</p> <p>24 "More realistic rate" is accuracy, isn't it,      25 Mr Ewan?</p>	<p style="text-align: center;">Page 7</p> <p>1 A. Yes.</p> <p>2 Q. So you are concerned about its accuracy now, is it      3 because you are looking at the consequences of the      4 meaning of that sentence?</p> <p>5 A. No. It's because I'm not a bank treasurer and I'm      6 trying to think through whether that would be the case      7 and without having deep and expert knowledge about the      8 way that banks' internal treasury functions work, I'm      9 not sure it would be something that I could state with      10 certainty.</p> <p>11 Q. Well, let's put it this way, Mr Ewan, you wouldn't have      12 made that sentence up, would you?</p> <p>13 A. No.</p> <p>14 Q. It would have reflected the information that you were      15 receiving at the time.</p> <p>16 A. Yes, I think that's fair.</p> <p>17 Q. So even if you weren't sure about its meaning you      18 regarded it as being sufficiently important to put it      19 into this memo?</p> <p>20 A. Yes.</p> <p>21 Q. Because I am going to suggest it means, doesn't it, that      22 the treasury within a bank is making commercial profit      23 from LIBOR?</p> <p>24 A. You would need to ask a bank treasurer about that.</p> <p>25 Q. Well, your sentence helps us, doesn't it:</p>

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<p>1 "It will cost if it increases its rates."</p> <p>2 <b>A. You would need to ask a bank treasurer.</b></p> <p>3 Q. Well, can you not understand the meaning of the sentence</p> <p>4 that you wrote?</p> <p>5 A. Yes, I understand it, it's fairly simple English words,</p> <p>6 but looking back on it now, I don't think, without</p> <p>7 speaking to bank treasurers, that I could say, hand on</p> <p>8 heart, that that's actually the case.</p> <p>9 Q. In fairness to you let's look at paragraph 3:</p> <p>10 "When pressed all contributors state that they</p> <p>11 currently quote accurate rates, genuinely based on their</p> <p>12 position."</p> <p>13 Right, the evidence you have given this morning and</p> <p>14 yesterday:</p> <p>15 "Rapidly changing their pattern of quoting could be</p> <p>16 seen as an admission that previous contributions were</p> <p>17 not accurate."</p> <p>18 If we turn over the page, you proffer two solutions,</p> <p>19 solution 1, the carrot and solution 2, the stick and</p> <p>20 we'll look at both of them.</p> <p>21 The carrot:</p> <p>22 "Co-ordinated action by a large number of panel</p> <p>23 banks directed from the most senior level. If I call</p> <p>24 someone on a desk and ask them to change their quote,</p> <p>25 the dealer will refuse for the reasons given above.</p>	<p>1 <b>market was so dysfunctional, so frozen, there was so</b></p> <p>2 <b>little cash trading that it was very -- the phrase</b></p> <p>3 <b>"accurate" is very, very difficult at this point in time</b></p> <p>4 <b>to know, which is why -- we keep on going back to</b></p> <p>5 <b>this -- our -- what we end up -- leaving this internal</b></p> <p>6 <b>memo to one side, if I may, what we actually do is try</b></p> <p>7 <b>very hard to persuade banks that they must quote</b></p> <p>8 <b>following the definition.</b></p> <p>9 Q. Your concerns are about the accuracy of the rate and the</p> <p>10 reputation of the benchmark.</p> <p>11 <b>A. Yes.</b></p> <p>12 Q. You don't know, as you've just said, what would be the</p> <p>13 accurate rate; yes?</p> <p>14 <b>A. That's correct.</b></p> <p>15 Q. But you are being told by people on your FX committee,</p> <p>16 as we looked at, that the rates were not accurate.</p> <p>17 <b>A. And various people would say the rates are too high and</b></p> <p>18 <b>others would say they're too low, because where there</b></p> <p>19 <b>isn't an observable market that is transacting regularly</b></p> <p>20 <b>it's very hard to know.</b></p> <p>21 <b>Now, in that situation, when people are saying,</b></p> <p>22 <b>"It's too high" or, "It's too low", one of them can be</b></p> <p>23 <b>right, they can't both be right, and so we don't know,</b></p> <p>24 <b>but what we're trying to do is get people to quote</b></p> <p>25 <b>accurate rates.</b></p>
<p style="text-align: center;">Page 9</p> <p>1 Banks must therefore be persuaded that it is in their</p> <p>2 collective interest to take action on this. There are</p> <p>3 a number of arguments that might appeal, the interbank</p> <p>4 market is dysfunctional at the moment. One reason for</p> <p>5 this might be that the interbank market prices</p> <p>6 specifically for LIBOR and if the LIBOR rates are not</p> <p>7 representative how can the market function? Moving to</p> <p>8 more representative quotes will help this."</p> <p>9 Pausing there, are you suggesting to your</p> <p>10 Chief Executive officer, Ms Knight, that there should be</p> <p>11 co-ordinated action with a number of banks directed at</p> <p>12 the senior level to try to get them to change their</p> <p>13 rates?</p> <p>14 <b>A. What I am suggesting is that there should be</b></p> <p>15 <b>co-ordinated effort to make sure that the rates are</b></p> <p>16 <b>accurate and quoted following the LIBOR definition.</b></p> <p>17 Q. We're in a position where the dollar LIBOR -- or</p> <p>18 certainly -- you are being told firstly that the rates</p> <p>19 are not reflective of where people are borrowing; yes?</p> <p>20 <b>A. That, yes, that comment was given to the BBA.</b></p> <p>21 Q. Secondly, that you regard that as being damaging to the</p> <p>22 accuracy of the rate; yes?</p> <p>23 <b>A. I don't know what an open "accurate" mark is. For two</b></p> <p>24 <b>reasons: the first is I never borrowed money in the</b></p> <p>25 <b>interbank cash market. And, number 2, the rate -- the</b></p>	<p style="text-align: center;">Page 11</p> <p>1 Q. If you don't know, as you've just said to the jury, what</p> <p>2 the accurate rate was, why would there need to be the</p> <p>3 carrot, as described here, of collecting the large</p> <p>4 number of panel banks and directing -- your words --</p> <p>5 from the most senior level?</p> <p>6 <b>A. Because there is commentary that the rates are not</b></p> <p>7 <b>accurate. We don't know for certain whether that's</b></p> <p>8 <b>true, but there is enough commentary to make it an issue</b></p> <p>9 <b>of concern for somebody who wants to run an accurate the</b></p> <p>10 <b>benchmark for the benefit of the markets and we regarded</b></p> <p>11 <b>this as being of sufficient concern that we wanted to</b></p> <p>12 <b>ensure that the rates were being quoted accurately.</b></p> <p>13 We didn't want to single out one particular bank</p> <p>14 because that -- we -- that wasn't felt to be</p> <p>15 appropriate. So, our view was the correct way to</p> <p>16 proceed would be to talk to everybody at the same time</p> <p>17 and give them the same message, and --</p> <p>18 Q. So, you are recommending, Mr Ewan, as we see in this</p> <p>19 note, just using your language that you've just used,</p> <p>20 that you do sit people down and talk to them to try, as</p> <p>21 you say here, to persuade them to get a more accurate</p> <p>22 rate?</p> <p>23 <b>A. We don't know what the accurate rate is. We face</b></p> <p>24 <b>continual commentary that the rates may not be accurate.</b></p> <p>25 <b>These are of sufficient -- these are sufficiently common</b></p>

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<p>1   that we feel we have to take action. The action that we      2   decided that we needed to take was to give all of the      3   banks the definition at the senior level, so everybody      4   in the banks knows that what we're trying to do, and try      5   to ensure that banks post following the definition.</p> <p>6   Q. Let's move on. Two:      7       "If the BBA were posting real US dollar rates it      8       would demonstrate to authorities worldwide how serious      9       the problems are and may influence their responses to      10      the issues."</p> <p>11      "Real" there means what?</p> <p>12   A. Again, we come back to this idea that nobody knows what      13       an accurate rate is because there isn't a liquid market      14       and banks aren't doing interbank deals.</p> <p>15   Q. Paragraph 3, I'm not going to take you entirely through      16       it because it repeats the issue of basis points from      17       credibility. I want to ask you about the last sentence:      18       "If we can orchestrate co-ordinated movement, no one      19       bank need be out of line with the rest of the      20       contributors."</p> <p>21      Did the BBA orchestrate co-ordinated movement?</p> <p>22   A. No.</p> <p>23   Q. Did the BBA try to orchestrate co-ordinated movement?</p> <p>24   A. The BBA -- the BBA in public, or in private, said      25       nothing to the banks other than, "Please can you quote</p>	<p>1   A. No.      2   Q. Because?      3       (Pause)      4       Because of the third paragraph?      5   A. I think so, yes.      6   Q. Conclusion --      7   A. Sorry, if you just -- banks were, at the time, voluntary      8       members of the LIBOR contributing panels. There is now      9       in law a requirement for banks to contribute to LIBOR,      10      there was not then. If we made it difficult or arduous      11      to be a LIBOR panel contributor the problem was that all      12      the banks might just suddenly say, "I don't want to do      13       this any more", and then there wouldn't be a LIBOR rate,      14      and I was being told by everybody, including central      15      banks and regulators, that it is very important that      16       there is a LIBOR rate in the market every day.      17   Q. Mr Ewan, that final paragraph that I've just read to you      18       doesn't reflect, with respect, what you've just told the      19       jury. What it reflects, if I may suggest, is the      20       tension by the fact that you were effectively upsetting      21       your members?      22   A. So, I don't need to tell Angela in a memo that, because      23       she knows it.      24   Q. Well, you told her about your largest members, but you      25       didn't tell her about the evidence that you have just</p>
<p style="text-align: center;">Page 13</p> <p>1   an accurate rate."</p> <p>2   Q. The stick, solution 2:      3       "There is no requirement for banks to deal at the      4       prices they quote, and indeed we could not create the      5       full suite of rates if we introduce this, as no      6       contributor bank will require funds each day for all the      7       currencies and maturities that they quote."</p> <p>8       That's a reference to the different number of tenors      9       that you have and currencies that you have, is that      10      right Mr Ewan?</p> <p>11   A. Correct.</p> <p>12   Q. "However, we could let it be known that we are      13       considering recommending to the FXMMC a policy whereby      14       banks could be asked periodically to show proof that      15       they have dealt recent light or very close to the prices      16       they contribute in the liquid tenors, say overnight,      17       3-month and 12-month. If a contributor cannot provide      18       evidence for this, we would recommend to the FXMMC that      19       they be removed from the panel. This would be highly      20       embarrassing and very damaging for a bank's reputation.</p> <p>21       The draw back to this is that the FXMMC committee      22       largely consists of the major contributors to the rates,      23       who are also our largest members, and they might not      24       approve of this idea."</p> <p>25      Was the second paragraph implemented?</p>	<p style="text-align: center;">Page 15</p> <p>1       given to the jury.</p> <p>2   A. I --</p> <p>3   Q. She would know this, wouldn't she?</p> <p>4   A. What that the FX and MM committee consists largely of      5       the major contributors to the rates? Yes, she would      6       know that.</p> <p>7   Q. Yes, yes. What you are doing there is highlighting to      8       her the clear tension about your membership.</p> <p>9   A. Yes, there is a tension. And with the benefit of 20/20      10      hindsight it turns out that, you know what, you probably      11      shouldn't have major benchmarks being run by industry      12      trade associations and LIBOR no longer is.</p> <p>13      At the time, we were in the position that we were      14      in. We couldn't go and get LIBOR submissions from      15      a group of people who weren't members of the BBA because      16      that group does not exist. Our -- we -- from the very      17      beginning our sole concern was to have accurate LIBOR      18      rates. Whatever accurate might mean, we wanted banks to      19      follow the definition of LIBOR.</p> <p>20   Q. Let's look at your conclusion:</p> <p>21       "We need to address this issue rapidly. Right now      22       the reputation of BBA LIBOR is being damaged and this      23       will directly influence our ability to continue to      24       profit from the data."</p> <p>25      What does that mean?</p>

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<p>1 A. I think the meaning of that is quite clear. But again      2 within the context this is a memo whose overarching      3 purpose is to try and figure out a way of getting the      4 banks to contribute according to the definition.</p> <p>5 Q. The note continues:      6 "I suggest we propose solution 1 to the next meeting      7 of the BBA board, and if this does not convince members      8 to take action, raise the possibility of solution 2."      9 In other words, may I suggest, it's the BBA seeking      10 the board's sanction for these points; yes? But you are      11 driving it, the BBA are driving it.      12 A. Well, LIBOR is owned by the BBA, but the -- the --      13 whilst the BBA owns it, it doesn't control it. It is      14 controlled by the Foreign Exchange and Money Markets      15 committee, or at least the maintenance of the definition      16 is controlled by the FX and money markets committee.</p> <p>17 Q. It's an important distinction, isn't it? The FXMMC      18 controlled the definition --</p> <p>19 A. Yes.</p> <p>20 Q. -- they didn't control the product, you did, the BBA      21 did.</p> <p>22 A. Yes, that's true. But whilst we controlled the product,      23 we were clear that we produced it as a service to the      24 markets for the benefit of the market.</p> <p>25 Q. No dispute, but it's a commercial product which the BBA</p>	<p>1 document.</p> <p>2 A. Well, I would have assumed that they would have been      3 later compiled into one because that was the purpose for      4 the consideration of the wider Foreign Exchange and      5 Money Markets committee.</p> <p>6 Q. Well, they are presented in these ways as single sheets.      7 There is a summary that we'll look at but it's not in      8 the same format as 6 and 7 and I wanted to know: was      9 there a document produced in the same way as we've seen      10 for 2006 and 2007?</p> <p>11 A. I can't remember.</p> <p>12 Q. All right. I only want to touch very quickly on some of      13 the matters in here, again they can be available to be      14 read entirely if necessary. The second response, this      15 is JP Morgan as we know on 1 April, you are present,      16 Peter Denton, who I think at this stage is your      17 assistant, is that right?</p> <p>18 A. Yes.</p> <p>19 Q. The two individuals from JP Morgan:      20 "There is a major difference between this year and      21 last year, there is very little activity in the cash      22 markets at the moment, it's dry and LIBOR figure is      23 miles away. This is our big concern regarding LIBOR.      24 People are only dealing very short in the cash markets      25 and there is little from three months and beyond if any."</p>
<p>Page 17</p> <p>1 had a vested interest in?</p> <p>2 A. It did have a vested interest in it, it had a vested      3 interest in making sure that product was as good as      4 possible.</p> <p>5 Q. Final sentence, in fairness to you so it's there:      6 "The CEOs or the chairman of the banks on the FX      7 committee make up the majority of the BBA board and      8 I believe it's these individuals alone who have the      9 authority and strategic outlook necessary to effect this      10 change."</p> <p>11 Now, did you attend the board meeting?</p> <p>12 A. I believe I did.</p> <p>13 Q. We'll come to that in a moment, but I just don't want to      14 take it out of chronological order. I wonder if we      15 could now look at JEX/042.</p> <p>16 Before we go to the content of this document,      17 Mr Ewan, I hope you'll agree the 2000 -- this is the      18 start of the 2008 relationship visits which had started      19 before the board meeting, I think it was on or about      20 16 April; okay?</p> <p>21 A. Yes.</p> <p>22 Q. The 2008 relationship visits in the way in which they      23 were recorded were slightly different from the ones that      24 we've looked at with the jury for 2007, 6 and 5. Do you      25 agree with that? They weren't in one compendious</p>	<p>Page 19</p> <p>1 "LIBOR is inaccurate and does not reflect actual      2 market conditions ... indicates a trade can be made at      3 a level but this is inaccurate as now trading happens at      4 LIBOR plus X amount of basis point. LIBOR has become      5 more of a consensus."</p> <p>6 Well now, what does that mean?</p> <p>7 A. I think that is a description of type 1 behaviour. In      8 other words, there's no -- there is very little, as Fred      9 says, there is very little cash available in three      10 months or longer tenors than three months and so banks      11 are having to form a view of where they would get money      12 if -- if there was any.</p> <p>13 Q. It's, if I may suggest, not type 1, is it, Mr Ewan?      14 Because type 1 would have required the submitter to seek      15 alternative sources of information as to the value of      16 the borrowing and his submission, but it would have been      17 an individual decision by each submitter, wouldn't it?</p> <p>18 A. Yes.</p> <p>19 Q. Type 1 would require an individual decision.</p> <p>20 A. Yes.</p> <p>21 Q. You are being told that LIBOR is more of a consensus,      22 which is not an individual decision.</p> <p>23 A. That could be a consensus within JP Morgan.</p> <p>24 Q. Well, that's not what your note says.</p> <p>25 A. I --</p>

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<p>1 Q. Does it?</p> <p>2 A. I think that's --</p> <p>3 Q. It's not qualified in that way.</p> <p>4 A. It's not qualified in that way so you know you have put one construction on that and I think it has another.</p> <p>5 Q. Well, forgive me:</p> <p>6 "LIBOR has become more of a consensus."</p> <p>7 I suggest it's difficult to construct that any other 8 way, isn't it?</p> <p>9 A. That's -- I think, that that means that JP Morgan are 10 having -- because they can't place -- they can't submit 11 what they've just traded because they haven't just 12 traded, so they're having to work out where their 13 submission would be.</p> <p>14 Q. Middle of the page, I am not going to take you through 15 all of this, if we could just scroll down the page, 16 please, where it says:</p> <p>17 "The LIBOR the benchmark is used and included in 18 other processes such as derivative trading where it 19 still works as you only need the figure, but it is 20 flawed in the interbank loans as the rate determines the 21 outcome and this is why the market is drying up."</p> <p>22 What do you understand the second sentence to mean?</p> <p>23 A. I -- I'm not sure, looking back, I could say exactly 24 what that means.</p>	<p>1 Q. All right. I just want to pick out something else 2 quickly from this note, if we can scroll down, please, 3 through the next page and on to the next one, please. 4 Thank you.</p> <p>5 Do you see in the middle of the page just by the 6 hole-punch, "Possibly make anonymous"? Now, that is 7 a reference, isn't it, to the discussions that were then 8 ongoing leading up to the consultation document as to 9 whether the rates submitted by the banks could be made 10 anonymous because of the effect of low-balling.</p> <p>11 In other words, people were seeing the rates the 12 banks were submitting and it was being associated with 13 credibility within the market.</p> <p>14 A. I think that that is -- so that was -- there was 15 widespread concern about the fact that there would be 16 a temptation to low-ball. This is a theoretical way of 17 removing that concern and we should note that it wasn't, 18 in fact, ever acted upon precisely because in the view 19 of the market as a whole there should be transparency.</p> <p>20 Q. I don't dispute that Mr Ewan, and I think this was 21 a subject that was taken to the FXMMC, in fairness to 22 you, and they rejected it; yes?</p> <p>23 A. Not just the Foreign Exchange and Money Markets 24 committee, I believe it was also in the consultation 25 document that we put out in -- a little later in 2008</p>
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<p>1 Q. Well, your response to it is:</p> <p>2 "Considering this do you consider LIBOR rate dead?"</p> <p>3 Does that help you now?</p> <p>4 A. I think that question is -- I think that statement -- 5 question, sorry, is if we can't set accurate LIBORs 6 according to the definition should we stop setting 7 LIBOR?</p> <p>8 Q. Well, does this note represent an abbreviated 9 aide-memoire of the discussion that you were having?</p> <p>10 A. Yes.</p> <p>11 Q. Do you say that in that note?</p> <p>12 A. A note is taken of it, I don't think -- I think this 13 note was probably written by Peter, I don't dispute that 14 he would -- I mean, he wouldn't have just made that up.</p> <p>15 So, yes, I think I probably did say, "Do you consider 16 the rate to be dead".</p> <p>17 Q. Forgive me, you misunderstood my question. You've given 18 evidence that you want to qualify that statement. My 19 question is: do we see in this note you qualifying that 20 statement?</p> <p>21 A. No, because it's a note rather than a verbatim record of 22 everything that was said.</p> <p>23 Q. You are saying you did say that, at the time, to 24 JP Morgan, are you?</p> <p>25 A. I don't remember.</p>	<p>1 and I believe that the balance of responses said that 2 there shouldn't be anonymisation.</p> <p>3 Q. Yes. I just wanted to set the context as to why its 4 referenced there, "Possibly make anonymous". In other 5 words, this was something being discussed leading up to 6 the document that you were then going to circulate and 7 it was as you've just said going into the consultation 8 for people to debate about; okay?</p> <p>9 A. Yes.</p> <p>10 Q. But it's the response I want to turn to: 11 "Barclays couldn't show as if they did it would have 12 caused a run on the bank."</p> <p>13 Then also JP Morgan: 14 "Problem, they can then report false rates at little 15 to no risk for their own gain."</p> <p>16 Your response: 17 "Yes, could be more cheating, especially by treasury 18 departments who want lower prices."</p> <p>19 It's your response I want to ask you about, what do 20 you mean by "more cheating"?</p> <p>21 A. I think this is a shortened note of a longer conversation, 22 and I think if we were able to see a verbatim record we 23 would see that that statement, I'm sure, would have been 24 a paraphrase of what I would actually have said.</p> <p>25 Q. So, you are not saying you said the words "more</p>
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<p>1 cheating"?</p> <p>2 <b>A. I don't remember.</b></p> <p>3 Q. Let's be clear about this: you will have seen this note</p> <p>4 after this meeting?</p> <p>5 <b>A. Yes, probably.</b></p> <p>6 Q. You didn't qualify it in any way?</p> <p>7 <b>A. No, you're right, I didn't.</b></p> <p>8 Q. You didn't correct it?</p> <p>9 <b>A. No.</b></p> <p>10 Q. You didn't say to your colleague, "Hold on a minute, I</p> <p>11 don't think I said that."</p> <p>12 <b>A. No, because at the time I was extremely busy trying to</b></p> <p>13 <b>do other bigger, more important things, like prepare the</b></p> <p>14 <b>board paper for the meeting that happens a week or two</b></p> <p>15 <b>after this conversation.</b></p> <p>16 Q. We have a reference again to treasury departments who</p> <p>17 want lower prices. Why would you have said that?</p> <p>18 <b>A. Because if there was a lower LIBOR rate, perhaps</b></p> <p>19 <b>a treasury department could borrow at a lower rate.</b></p> <p>20 Q. The treasury department is where the submitters are</p> <p>21 usually located, isn't it?</p> <p>22 <b>A. Yes, it's not difficult to theorise that a treasury</b></p> <p>23 <b>department might want to borrow at a lower rate, that's</b></p> <p>24 <b>quite obvious, but this is -- that -- this is</b></p> <p>25 <b>a theoretical discussion about what might happen if the</b></p>	<p>1 <b>attested that that is what they would do.</b></p> <p>2 Q. Let's look very quickly then, please, at JEX044. I only</p> <p>3 want to ask you two or three things about this note.</p> <p>4 Again, if we can just scroll it down, this is your</p> <p>5 relationship visit with one of the Japanese banks; yes?</p> <p>6 <b>A. Yes.</b></p> <p>7 Q. And it's dated -- I can tell you -- I hope you accept</p> <p>8 from me -- 3 April 2008; okay?</p> <p>9 <b>A. Yes.</b></p> <p>10 Q. Do you see the third highlighted "LIBOR" under black in</p> <p>11 the top sentence? That sentence:</p> <p>12 "This point was developed further by stating reasons</p> <p>13 why LIBOR rates in US dollar are too low; prestige,</p> <p>14 treasury, et cetera. Yet everyone is aware that this is</p> <p>15 not correct and causes a drop in credibility. Such as</p> <p>16 Barclays quotes being quite high, but this is not down</p> <p>17 to liquidity problems but more down to 'telling the</p> <p>18 truth'."</p> <p>19 Now, we don't know who said that but let's assume,</p> <p>20 shall we, that you are being told that?</p> <p>21 <b>A. Yes.</b></p> <p>22 Q. So, you are being told yet again the dollar is too low</p> <p>23 because of prestige, that is type 2, isn't it? Type 2</p> <p>24 low-balling; yes? Type 2 low-balling, Mr Ewan?</p> <p>25 <b>A. Forgive me, I'm reading the paragraph.</b></p>
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<p>1 to the panel, US dollars are too low prestige, which  2 I suggest is type 2 low-ballng.</p> <p>3 <b>A. I don't think that that's necessarily the case.</b></p> <p>4 <b>These -- this is a bank that is not a major player in</b>  5 <b>the dollar market.</b></p> <p>6 Q. So --</p> <p>7 <b>A. You can infer from that --</b></p> <p>8 Q. So, forgive me for one moment --</p> <p>9 <b>A. You can infer from that, if I may, you can infer from</b>  10 <b>that a number of things. One of the things is that they</b>  11 <b>will almost certainly have to pay more on the occasions</b>  12 <b>in which they do borrow dollars in the London market.</b></p> <p>13 Now, that -- that being the case, they would be  14 likely to be of the view that dollars are too low. The  15 prestige issue is they have less prestige. I mean it  16 follows that the biggest, strongest, most active banks  17 can borrow at a lower rate than other banks. I think  18 that this is Mizuho complaining about the fact that in  19 essence they are upset because they can't borrow dollars  20 as cheaply as panel banks.</p> <p>21 Q. So does it follow from that, that you would give this  22 expression of concern about prestige, little weight?</p> <p>23 From the explanation you have just given, does it follow  24 that what we are reading there, the BBA would not have  25 given significant weight to?</p>	<p>1 they don't like the rates?</p> <p>2 <b>A. No, I am inferring it. I am inferring it.</b></p> <p>3 Q. This is the BBA's note of the conversation that has been  4 had. Quite straightforward, Mr Ewan, isn't it?</p> <p>5 Everyone is aware that this is not correct and it causes  6 a drop in credibility.</p> <p>7 They provide an explanation:</p> <p>8 "Barclays quote being quite high but this not down  9 to liquidity problems more down to 'telling the truth'."</p> <p>10 In other words, Barclays were quoting high at that  11 stage, but were being crucified in the media for doing  12 so, no one else was. That's what that is saying, isn't  13 it? That's what that is telling you.</p> <p>14 <b>A. It is a report of a period in which this bank would very</b>  15 <b>likely have wanted to have seen significantly higher</b>  16 <b>LIBOR dollar rates for its own ends. I think --</b></p> <p>17 Q. It continues doesn't it:</p> <p>18 "The fundamental problem with the market is down to  19 confidence, this comes down to one bank's confidence in  20 every other bank in the market, rather than  21 historically, the loss of confidence in the markets  22 generally."</p> <p>23 They are not talking in a self-interested way to  24 you, are they, Mr Ewan? They are reflecting their view  25 of the market at that time.</p>
<p style="text-align: center;">Page 29</p> <p>1 <b>A. I think it's -- that is not the case because at -- when</b>  2 <b>is this? In April we are in the process of formulating</b>  3 <b>our consultation and the paper to the board to -- which</b>  4 <b>is -- whose central theme is to try and get banks to</b>  5 <b>contribute to the LIBOR rates following the LIBOR</b>  6 <b>definition.</b></p> <p>7 So, I don't think it is at all fair to say that we  8 are discounting anybody's opinions.</p> <p>9 Q. Treasury. Does it mean in that context where it appears  10 in this document?</p> <p>11 <b>A. I'm -- there's -- there's not enough context around that</b>  12 <b>for me to reconstruct, 7 years later, exactly what was</b>  13 <b>being suggested there, I don't think.</b></p> <p>14 Q. They are clearly telling you on the note, aren't they,  15 that everyone is aware that the rate in US dollar LIBOR  16 is not correct and causes a drop in credibility.</p> <p>17 <b>A. They are telling us that they don't like the LIBOR</b>  18 <b>rates.</b></p> <p>19 Now, we knew that a lot of people didn't like the  20 LIBOR rates. We were therefore trying very hard to get  21 in place a structure and a process whereby everybody  22 could be happy that banks were submitting LIBOR  23 according to the LIBOR definition.</p> <p>24 Q. Forgive me, does the note say they don't like the rates?</p> <p>25 It's a straightforward question: does the note say that</p>	<p style="text-align: center;">Page 31</p> <p>1 <b>A. Yes, it's their view.</b></p> <p>2 Q. They actually say, don't they, third paragraph down  3 after the confidence:</p> <p>4 "Mizuho, being a Japanese bank, are fairing better  5 than other banks and are in front of the curve."</p> <p>6 If we just highlight the front of that first  7 paragraph, please.</p> <p>8 So, they are saying the opposite of what you are now  9 telling the jury.</p> <p>10 <b>A. No, because I don't think -- I think this funding</b>  11 <b>issue -- the conversation above is a reference to dollar</b>  12 <b>and Mizuho is a Japanese bank that funds in Japan in</b>  13 <b>yen, I believe. I don't know for certain, but that is</b>  14 <b>my understanding about the way that Japanese banks</b>  15 <b>behaved at the time.</b></p> <p>16 Q. I wonder if we can turn, please, to JEX/045, please.  17 This is your meeting with Abbey.</p> <p>18 <b>A. Yes.</b></p> <p>19 Q. Same date, 3 April 2008. We can deal with this, I hope,  20 fairly quickly. The only thing I want to highlight is  21 in that second paragraph you see where it says:  22 "Abbey feels this is not a realistic --"</p> <p>23 No, above that please:</p> <p>24 "Abbey feels that this is not a realistic view and  25 the market is inaccurate."</p>

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<p>1 Let's look at it in its context:</p> <p>2 "One month ago there were offers at 25-28 basis</p> <p>3 points above LIBOR for strips, while at the moment</p> <p>4 offers are more 30-33. However, there is a cash market</p> <p>5 for the short-term, less than three months. Abbey feels</p> <p>6 this is not a realistic view and the market is</p> <p>7 inaccurate."</p> <p>8 Let's put it in its context in fairness to you:</p> <p>9 "However, they also argued that it can be viewed as</p> <p>10 realistic as there are only (in relative terms) dealings</p> <p>11 in the short-term and not medium too long which</p> <p>12 represents the general feeling in the market at the</p> <p>13 moment, but even in short-term you still have to bid</p> <p>14 over the odds (referring to LIBOR) to secure."</p> <p>15 You are being told again on the same day by</p> <p>16 a different organisation, panel bank or otherwise, that</p> <p>17 the market is not accurate.</p> <p>18 <b>A. So, once again let's look at the context. Abbey, if</b></p> <p>19 <b>I recall, at the time, only contributed to sterling, and</b></p> <p>20 <b>I think, it's not said, but I think this is probably</b></p> <p>21 <b>a conversation about dollars.</b></p> <p>22 <b>In that Abbey is not a LIBOR dollar panelist bank,</b></p> <p>23 <b>if they are saying they have to bid over the odds that</b></p> <p>24 <b>doesn't give me any problem whatsoever. LIBOR is</b></p> <p>25 <b>designed to be the biggest, strongest banks that can</b></p>	<p>1 She talks about, again reflecting of your note, the</p> <p>2 reputation of LIBOR is damaged and so on and so forth.</p> <p>3 And the market is dysfunctional. Do you see those</p> <p>4 references?</p> <p>5 <b>A. Yes.</b></p> <p>6 Q. Then we come to the recommendations. Now, the</p> <p>7 recommendations are not your carrot and stick note, but</p> <p>8 they draw upon some of your recommendations to her in</p> <p>9 a different way. Do you understand?</p> <p>10 <b>A. Yes.</b></p> <p>11 Q. Would you have seen this board document? Because you</p> <p>12 attended the board.</p> <p>13 <b>A. Probably.</b></p> <p>14 Q. I wonder if we can just scroll down. Thank you.</p> <p>15 The recommendations that Ms Knight is making to the</p> <p>16 board are, firstly:</p> <p>17 "Co-ordinated action by a large number of panel</p> <p>18 banks, directed from the most senior level."</p> <p>19 Now, if we remember, that was your recommendation</p> <p>20 verbatim. Do you remember that or not? Do you want to</p> <p>21 look at your note beside it?</p> <p>22 <b>A. Yes, if -- I might be able to turn back to that.</b></p> <p>23 MR CHAWLA: Page 166 of your file.</p> <p>24 <b>A. Thank you.</b></p> <p>25 MR HAWES: I wonder if we could produce -- is it 166 or 161?</p>
<p style="text-align: center;">Page 33</p> <p>1 secure funding at the lowest levels and everybody else</p> <p>2 in the market in times of stress, pays over the odds.</p> <p>3 So, it pays above LIBOR, they pay LIBOR plus</p> <p>4 an amount. That's indicative of the rate doing what it</p> <p>5 should be doing.</p> <p>6 Q. I am coming away for one moment and I wonder if we could</p> <p>7 just put on to the screen from the larger bundles 449,</p> <p>8 please.</p> <p>9 I just want to show you this, Mr Ewan for context</p> <p>10 because we are now leading up to the board meeting;</p> <p>11 okay? I showed you and I asked you questions about your</p> <p>12 memo this morning. Just when we get the opportunity to</p> <p>13 put it on the screen for one moment. It is 449, please.</p> <p>14 Thank you. Now, this I think the jury have seen</p> <p>15 previously but it is the document that we see that goes</p> <p>16 from Ms Knight to the board. And it draws from the</p> <p>17 document I have asked you questions about this morning,</p> <p>18 do you understand? Do you remember the memo that you</p> <p>19 sent to Ms Knight?</p> <p>20 <b>A. Yes.</b></p> <p>21 Q. Right. You can see, I think, the first paragraph is</p> <p>22 very similar to that which you set out to her in your</p> <p>23 memo; okay?</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. We've been through that already.</p>	<p style="text-align: center;">Page 35</p> <p>1 <b>A. 166.</b></p> <p>2 MR HAWES: Thank you. 166 beside it, please, which is</p> <p>3 JEX/040.</p> <p>4 THE OPERATOR: I can't do it with this.</p> <p>5 MR HAWES: All right, let Mr Ewan see if he can see it in</p> <p>6 his hard copy. Correct me if I'm wrong, Mr Ewan, but my</p> <p>7 memory of it is, and it is only my memory, paragraph 1,</p> <p>8 sentence 1, is yours.</p> <p>9 <b>A. Yes.</b></p> <p>10 Q. Thank you.</p> <p>11 So, your recommendation was being put to the board</p> <p>12 for a co-ordinated action of meeting, co-ordinated</p> <p>13 action, of the panel banks at the most senior level, she</p> <p>14 elaborates on that, which is:</p> <p>15 "Chairman and CEOs [as we see in this note] should</p> <p>16 be apprised of the problem and request that their staff</p> <p>17 reflect the actual level of their current US dollar</p> <p>18 fixings when they contribute their rate."</p> <p>19 Yes?</p> <p>20 <b>A. So, the co-ordination there refers to all banks being</b></p> <p>21 <b>told at the same time, "Please quote LIBOR according to</b></p> <p>22 <b>the definition."</b></p> <p>23 Q. Well, was it slightly more than that, Mr Ewan? Was it,</p> <p>24 "Please quote LIBOR, but with a view to increasing the</p> <p>25 rates"? Because they were not reflective of the market.</p>

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<p>1 A. I do not recall exactly what was given to the banks at      2 the -- but I am certain that, because the BBA does not      3 know what an accurate LIBOR is.      4 Q. Yes, you have said that.      5 A. Yes. And so, the instruction is, "Please submit rates      6 in line with the definition which will therefore      7 obviously be accurate", whatever that means.      8 Q. She continues:      9 "If we can orchestrate co-ordinated movement no      10 single bank need be out of line with the rest of the      11 contributors."      12 Again, I suggest that is taken from the note that we      13 looked at this morning, verbatim.      14 A. So again, the BBA has had an awful lot of commentary      15 that the rates aren't accurate, and --      16 Q. Forgive me, Mr Ewan, my question is: is that sentence      17 taken from your note?      18 A. Sorry, which sentence?      19 Q. "If we can orchestrate co-ordinated movement, no single      20 bank need be out of line with the rest of the      21 contributors."      22 Paragraph 3 of your note, the carrot and stick note;      23 yes?      24 A. Yes.      25 Q. "If we can orchestrate co-ordinated movement no one bank</p>	<p>1 contributors are submitting rates that they believe are      2 in line with the definition.      3 I accept that that is something that we are trying      4 to do with all of the banks together, but that is the      5 extent of the co-ordination or orchestration.      6 Q. It is:      7 "Orchestrate co-ordinated movement so that no bank      8 needs to be [your words] out of line."      9 What does "out of line" mean?      10 A. It's very difficult to say because we do not -- the      11 BBA -- right, the BBA doesn't know exactly what the      12 correct number for LIBOR is, it merely has to try and      13 ensure that banks follow the definition. We are being      14 told, however, a lot that the rates are not reflective      15 of what is really going on.      16 Q. The truth is, I suggest, that "out of line" means that      17 you wanted the rates to increase?      18 A. No. I don't accept that.      19 Q. And that the orchestrated co-ordinated movement was to      20 try to get the senior heads of the banks together to      21 bring that about?      22 A. The BBA had no reason whatsoever to try and move the      23 LIBOR rates up or down, it mattered not to the BBA.      24 What mattered to the BBA was that there was commentary      25 that the rates were not accurate, whatever that might</p>
<p style="text-align: center;">Page 37</p>	<p style="text-align: center;">Page 39</p>

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<p>1 Again taken from your note.</p> <p>2 <b>A. Yes.</b></p> <p>3 Q. It is the correlation between paragraph 1 and 4 paragraph 2, "If (1) does not succeed". In other 5 words: if they don't come back into line this is what 6 we're going to do.</p> <p>7 <b>A. And so, if we do, and the banks are, as we would like 8 them to do, quoting within the definition of LIBOR, 9 there won't be a problem.</b></p> <p>10 Q. This board meeting, is this the occasion when the BBA 11 required the members of the Board to start to sign 12 non-disclosure agreements or did that come later?</p> <p>13 <b>A. I couldn't comment, I don't -- I don't remember the 14 board being asked to sign that. That's -- I wasn't 15 the -- a member of the Board.</b></p> <p>16 MR HAWES: I wonder if that is an appropriate moment because 17 I just want to put on the system, my Lord, another 18 document which is not immediately in front of you and 19 will take a moment to load up in any event.</p> <p>20 MR JUSTICE COOKE: 10 minutes, please, members of the jury. 21 (11.33 am)</p> <p>22 (A short break)</p> <p>23 (11.50 am)</p> <p>24 MR HAWES: Thank you, my Lord.</p> <p>25 This is for your Lordship's note, I think we are</p>	<p>1 before the board sits?</p> <p>2 <b>A. Yes.</b></p> <p>3 Q. My first question before we look at the letter itself: 4 why is Mr Merriman writing this and not you?</p> <p>5 <b>A. Perhaps he was asked to by Angela. Perhaps he did it 6 off his own bat, I don't know.</b></p> <p>7 Q. If we scroll down, please. I only want to highlight 8 some aspects of this but in fairness to you I think we 9 are going to have to look at this in totality.</p> <p>10 This is a draft; okay? Do you know whether you 11 letter of this type was sent?</p> <p>12 <b>A. I believe it was. I don't know what exactly I -- 13 I don't know in -- for sure what was sent.</b></p> <p>14 Q. All right. I wanted to show you this because of another 15 document we're coming on to in a moment. Was this draft 16 in this format or a draft of this type given to the 17 board meeting?</p> <p>18 <b>A. I'm -- I'm not sure.</b></p> <p>19 Q. All right. It says:</p> <p>20 "Dear CEO, maintaining the integrity of LIBOR 21 fixings.</p> <p>22 "As you are well aware, the current turmoil in 23 financial markets has led to a large number of anomalies 24 and unexpected behaviours. This is now leading to 25 widespread concerns from a number of market participants</p>
<p>Page 41</p> <p>1 going to have a hard copy of this, D15. 2 I just want to show you a last document, Mr Ewan, 3 before we get to the board meeting itself, okay? 4 I think, so correct me if I'm wrong, the board meeting 5 is this date: 16 April 2008.</p> <p>6 <b>A. I believe so.</b></p> <p>7 Q. Thank you.</p> <p>8 The board meetings were held at what time? During 9 the day or the evening?</p> <p>10 <b>A. During the working day.</b></p> <p>11 Q. But they wouldn't -- what I am trying to establish is, 12 is this e-mail being circulated in advance of that 13 meeting?</p> <p>14 <b>A. I couldn't say.</b></p> <p>15 Q. All right. Let's look at it. This is from 16 Alex Merriman to you and to Ms Knight and the other 17 individuals mentioned there. Are they all internal BBA 18 individuals?</p> <p>19 <b>A. Yes.</b></p> <p>20 Q. The subject matter is: letter to panel bank CEOs on 21 integrity of the LIBOR fixings: 22 "As mentioned earlier [he writes] this morning, here 23 the draft that I had in my head to wave in front of the 24 board later." 25 So, it implies, doesn't it, that this is written</p>	<p>1 that BBA LIBOR panel banks are floating one rate to be 2 included in the fixings on a daily basis and then 3 entering the markets to obtain funds at another (very 4 often 20 to 30 basis points above the quoted fixing 5 rate). While we appreciate that current liquidity in 6 financial markets is abnormal we are nonetheless very 7 much concerned that the integrity of the LIBOR fixings 8 process should not be compromised nor markets misled. 9 "As you are also aware, BBA LIBOR fixings are relied 10 on exhaustively to price a wide range of global 11 financial products and instruments. Perhaps upwards of 12 50 per cent of global swaps activity is priced according 13 to this indicator, and a significant number of US 14 mortgage products are also aligned according to the US 15 dollar LIBOR the benchmark. As a result we believe that 16 the recent events may be compromising the integrity of 17 the LIBOR fixings (primarily in US dollars but also in 18 other currencies as well), and therefore are also 19 affecting one of the pillars of the financial system 20 itself. In current circumstances we do not believe that 21 a widely used and dependable financial indicator being 22 compromised in this way is at all helpful, and indeed it 23 is detrimental to the reputation of the panel 24 contributors, the LIBOR fixings process, and indeed that 25 of the BBA itself, as the custodian and guardian of the</p>

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<p>1 BBA LIBOR fixings.</p> <p>2 "These issues were discussed at a BBA board meeting</p> <p>3 on 16 April ..."</p> <p>4 Just pause there, this is being circulated as we've</p> <p>5 just looked at by Mr Merriman in advance of the meeting.</p> <p>6 <b>A. Mm-hm.</b></p> <p>7 Q. Hence my question: was this given to the meeting to look</p> <p>8 at. All right? That's why I asked you the question.</p> <p>9 <b>A. I understand the question and I -- I don't know whether</b></p> <p>10 <b>it was or not.</b></p>	<p>1 <b>it off his own bat, writing down a -- off the top of his</b></p> <p>2 <b>head, I think he used the phrase or something along</b></p> <p>3 <b>those lines, a suggestion for a draft that could be put</b></p> <p>4 <b>to the board.</b></p> <p>5 Q. Can we go, please, to JEX/048.</p> <p>6 I think just to assist us, we have audio for this.</p> <p>7 I think it's JEX/028. I wonder if we could play that</p> <p>8 and then follow this on the screen.</p> <p>9 (Audio transcript played)</p>
<p>11 Q. "These issues were discussed at the BBA board meeting on</p> <p>12 16 April, and bank CEOs have agreed that the following</p> <p>13 action will now be taken by the BBA, which will: (i)</p> <p>14 bring forward its annual review of BBA panel banks</p> <p>15 from June to May; (ii) review aspects of the BBA LIBOR</p> <p>16 framework including definitions; (iii) examine</p> <p>17 thoroughly all of the individual market data it receives</p> <p>18 via its market surveillance tool; (iv) investigate any</p> <p>19 continuing anomalies in market behaviour, by BBA LIBOR</p> <p>20 panel banks;</p>	<p>10 That is a long conversation, Mr Ewan, which we have</p> <p>11 played because of its length. A number of questions</p> <p>12 arise from it. Do you remember the carrot and stick</p> <p>13 document that we looked at this morning; yes?</p>
<p>21 "In order to consider whether it would be</p> <p>22 appropriate to remove particular contributing banks from</p> <p>23 the relevant panel (S)."</p>	<p>14 <b>A. Yes.</b></p> <p>15 Q. "If we can orchestrate co-ordinated movement no one ban</p> <p>16 need be out of line with the rest of the contributors."</p>
<p>24 Over the page, please:</p>	<p>17 You gave evidence, I think, this morning, that that</p> <p>18 didn't amount to what it was effectively saying, it was</p> <p>19 something different about the true rate --</p>
<p>25 "I hope you agree that this action is justified at</p>	<p>20 <b>A. Hold on --</b></p> <p>21 Q. Hold on, the question is: how is that consistent with</p> <p>22 you telling Mr Storey at Barclays that the board had</p> <p>23 quietly agreed, your words, to "float the dollar rate</p> <p>24 up"?</p>
<p>Page 45</p>	<p>25 <b>A. I think the board had discussed that. I don't think it</b></p> <p>Page 47</p>
<p>1 this time, and I should welcome your confirmation that</p> <p>2 you have brought this letter to the attention of your</p> <p>3 relevant treasury executives and dealing desks, and that</p> <p>4 it is being acted upon. This letter is also being</p> <p>5 widely shared with central banks and regulators</p> <p>6 worldwide, as well as those entities/organisations that</p> <p>7 have been in touch with the BBA about the current</p> <p>8 problems, and media."</p>	<p>1 <b>was agreed. I don't recall, precisely, any</b></p> <p>2 <b>conversations at that board.</b></p> <p>3 Q. The words "board members" and "strategy" were discussed</p> <p>4 with regard to floating the dollar rate up.</p>
<p>9 Then it was designed to be sent by Angela, as you</p> <p>10 can see, Angela Knight; yes?</p>	<p>5 Do you remember that being discussed at the board?</p>
<p>11 <b>A. Yes.</b></p>	<p>6 <b>A. I don't.</b></p>
<p>12 Q. So in advance of the board meeting, the BBA had already</p> <p>13 devised, if I may suggest, the route forward that you</p> <p>14 wanted the board to take, set out in those (i) to (iv)?</p>	<p>7 Q. You don't.</p>
<p>15 <b>A. I don't believe, in general, it is unusual for the</b></p> <p>16 <b>secretariat of a committee to create a -- a straw man</b></p> <p>17 <b>document.</b></p>	<p>8 So, why are you telling Mr Storey that day, after</p>
<p>18 <b>But I'm -- the BBA would not be able to, in any way,</b></p> <p>19 <b>push this through if the board decided that they wanted</b></p> <p>20 <b>to do something else or something different.</b></p>	<p>9 the event, that the idea is to float the dollar rate up?</p>
<p>21 Q. Well, let's see if we can agree to this extent; the BBA</p> <p>22 was trying to set the agenda for the agreement of the</p> <p>23 board.</p>	<p>10 <b>A. I don't remember now, seven years later, the</b></p>
<p>24 <b>A. Well, what that letter is, is Alex Merriman, whether</b></p> <p>25 <b>because he has been asked or whether because he is doing</b></p>	<p>11 <b>conversations. I think what I said was: it was</b></p>
	<p>12 <b>discussed. I don't know whether -- I don't recall</b></p>
	<p>13 <b>whether there was any action on the back of that.</b></p>
	<p>14 Q. That there would be "preparing" of senior management.</p>
	<p>15 What does that concern?</p>
	<p>16 <b>A. I don't remember.</b></p>
	<p>17 Q. The news story that is referred to in this telephone</p>
	<p>18 conversation was on Bloomberg, is that right?</p>
	<p>19 <b>A. That seems to be what -- yes, that's what I am saying.</b></p>
	<p>20 Q. And do you have a recollection of what the Bloomberg</p>
	<p>21 news story was?</p>
	<p>22 <b>A. No.</b></p>
	<p>23 Q. Did it concern the threat of sanctions that we have seen</p>
	<p>24 in the three documents, your carrot and stick document,</p>
	<p>25 Angela Knight's document to the board and the draft</p>

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<p>1 letter?</p> <p>2 <b>A. It may well have done.</b></p> <p>3 Q. And it had, as Miles Storey said, the effect of raising</p> <p>4 the rate by 10 basis points. Dollar rate.</p> <p>5 (Pause)</p> <p>6 We just heard it.</p> <p>7 <b>A. Yes, I'd just like to ...</b></p> <p>8 (Pause)</p> <p>9 No, it's not the -- it's nothing to do with LIBOR,</p> <p>10 what he says is the OIS LIBOR spreads popped 10 basis</p> <p>11 points. That's an OIS -- that is the difference between</p> <p>12 the OIS rate and the LIBOR rate, that's nothing to do</p> <p>13 with LIBOR.</p> <p>14 Q. Based on what?</p> <p>15 <b>A. What Miles is saying, based on a new story.</b></p> <p>16 Q. The new story concerned what?</p> <p>17 <b>A. I assume LIBOR. No hold on, hold on, this is a very,</b></p> <p>18 <b>very important point here, right? Because if this</b></p> <p>19 <b>conversation is taking place at 5.20 -- 5.26 pm,</b></p> <p>20 <b>on April 16, LIBOR has set for the day. There is</b></p> <p>21 <b>a LIBOR rate for the day and that is the only LIBOR rate</b></p> <p>22 <b>that is published.</b></p> <p>23 <b>OIS is a different derivative market that moves and</b></p> <p>24 <b>goes up and down throughout the day and it's not one</b></p> <p>25 <b>that the BBA has any involvement with whatsoever.</b></p>	<p>1 Q. The OIS rate, I suggest, was constant, it was LIBOR</p> <p>2 that --</p> <p>3 <b>A. No, that is simply incorrect, there is one LIBOR rate</b></p> <p>4 <b>set on a business day at 11 o'clock in London and that</b></p> <p>5 <b>is the only rate that is set until the next business</b></p> <p>6 <b>day.</b></p> <p>7 Q. Do you have a memory of the next day after 16 April,</p> <p>8 when this conversation is, as to what effect, if any,</p> <p>9 there was on the dollar LIBOR.</p> <p>10 <b>A. I don't.</b></p> <p>11 Q. Because I am going to suggest there was a blip, it went</p> <p>12 up, quite a lot.</p> <p>13 <b>A. I -- I'm prepared to believe that might be the case.</b></p> <p>14 <b>I don't remember.</b></p> <p>15 Q. In other words, what Miles Storey is saying to you in</p> <p>16 this transcript comes to pass. It does have an effect</p> <p>17 through the media.</p> <p>18 <b>A. I -- I can't comment, I don't know. I don't know</b></p> <p>19 <b>exactly what was going through the minds of the LIBOR</b></p> <p>20 <b>contributing banks on the April 16 and April 17, seven</b></p> <p>21 <b>years ago.</b></p> <p>22 Q. Slightly different area. I have shown you this morning</p> <p>23 the three documents as we've touched on, your carrot and</p> <p>24 stick document, let's call it that. Angela Knight's</p> <p>25 take on that sent to the board and the draft letter that</p>
<p style="text-align: center;">Page 49</p> <p>1 <b>If a completely different rate moves it's quite</b></p> <p>2 <b>accurate to say, as it may have been at the time, the</b></p> <p>3 <b>spread between OIS and LIBOR moved or popped 10 basis</b></p> <p>4 <b>points. That's not saying anything at all about LIBOR</b></p> <p>5 <b>moving.</b></p> <p>6 Q. Forgive me, we can look at the document if we need to</p> <p>7 but we've just heard it, isn't Miles Storey saying to</p> <p>8 you:</p> <p>9 "Coincidentally, the release of the news may have</p> <p>10 some of the effect that you are trying to achieve."</p> <p>11 He says that, doesn't he?</p> <p>12 <b>A. He says that. I have --</b></p> <p>13 Q. Which is LIBOR?</p> <p>14 <b>A. Right.</b></p> <p>15 Q. Which is LIBOR, isn't it, Mr Ewan?</p> <p>16 <b>A. No, no, no, no, this is important. He is saying that</b></p> <p>17 <b>a rate -- sorry, a spread between OIS and LIBOR has</b></p> <p>18 <b>moved. LIBOR has not moved.</b></p> <p>19 Now, there's a second thing that you say which is</p> <p>20 the effect that Miles says that, "I wish to have</p> <p>21 an effect", which is for dollar LIBORs to move.</p> <p>22 Now, he says that, and I accept that I do not</p> <p>23 contradict that on the call, but I don't care at what</p> <p>24 level dollar LIBOR is set, I just want them to be set in</p> <p>25 line with the definition.</p>	<p style="text-align: center;">Page 51</p> <p>1 Alex Merriman had provided. All right? Those three</p> <p>2 documents.</p> <p>3 <b>A. Yes.</b></p> <p>4 Q. Which document are you referring to in this transcript,</p> <p>5 if it is one of those three that would be your worst</p> <p>6 nightmare if it came out?</p> <p>7 <b>A. I -- I don't know.</b></p> <p>8 Q. Miles is talking to you about a document that has been</p> <p>9 passed to him, bottom of page 2 -- I'm very grateful --</p> <p>10 of that transcript. I wonder if we could just -- thank</p> <p>11 you -- take the jury to that as well, please. Thank you</p> <p>12 very much.</p> <p>13 So, a journalist has taken something, put something</p> <p>14 into the media; yes?</p> <p>15 <b>A. Mm-hm.</b></p> <p>16 Q. But Miles Storey at Barclays Bank has a document in his</p> <p>17 possession. I want to know if you can assist us as to</p> <p>18 which of those three documents -- or whether it was</p> <p>19 another document -- he had in his possession.</p> <p>20 MR JUSTICE COOKE: Doesn't the document tell us?</p> <p>21 MR HAWES: It doesn't.</p> <p>22 MR JUSTICE COOKE: Thank you.</p> <p>23 <b>A. I would assume -- frankly, I'm not sure that it matters</b></p> <p>24 <b>If the question is: what is my worst nightmare? It's</b></p> <p>25 <b>whichever one it is being reported as Foreign Exchange</b></p>

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<p>1 and Money Market policy without the Foreign Exchange and  2 Money Market committee having agreed to it. Because  3 that would be -- that would not be correct because it's  4 The Foreign Exchange and Money Markets committee's job  5 to run LIBOR.</p> <p>6 Q. Isn't it the board notification that he has in his  7 possession? In other words, the documents that were  8 before the board?</p> <p>9 A. <b>Probably.</b></p> <p>10 MR JUSTICE COOKE: I think you should direct him to page 1,  11 if I may say so, Mr Hawes.</p> <p>12 MR HAWES: Sorry, my Lord.</p> <p>13 If one looks at page 1.</p> <p>14 A. <b>So, it's Angela's board memo.</b></p> <p>15 Q. Within which, taken from your original document, there  16 was a concession that there were concerns about the  17 market.</p> <p>18 A. <b>Well, we're in the teeth of a credit crunch, yes,  19 there's concern about the market.</b></p> <p>20 Q. And the extracts that we looked at where you -- because  21 she adopts it verbatim -- are suggesting as  22 an organisation, the orchestrated, co-ordinated movement  23 where no one bank need be out of line with the rest of  24 the contributors.</p> <p>25 A. <b>So once again, at the top of that document the first</b></p>	<p>1 because I haven't seen trade tickets of banks where they  2 are dealing away from their LIBOR rates. I have,  3 however, throughout 2007 and 2008, heard continuing  4 grumbles about the accuracy of LIBOR and I just want  5 LIBOR to be set in accordance with the definition.</p> <p>6 Q. Can I take you to page 6 of that document, please. Of  7 the transcript. The second entry there. The discussion  8 was:</p> <p>9 "I mean everybody at the board, everybody who was at  10 the board recognised, you know, that this the, you know,  11 there was an issue.</p> <p>12 "I think there is a recognition that this is one  13 that is best dealt with quietly. It needs to be dealt  14 with at a high level, so the board members were going to  15 have a word with their people who sort of quote the  16 rates and also create the strategy. I think the idea  17 was that it's unusual because it's not something that's  18 connected to the credit crunch because dollars, the euro  19 and sterling don't show the same effect."</p> <p>20 Pausing there, you wouldn't have said that to  21 Miles Storey at that stage unless there had been some  22 agreement at the board meeting that that is what was  23 going to happen, would you?</p> <p>24 A. <b>So, I think the key point is to investigate is there  25 anything that makes dollars unique? So, try and figure</b></p>
<p style="text-align: center;">Page 53</p> <p>1 <b>thing I say, if I recall, is that I have serious  2 concerns that the -- that the dollar LIBORs may not be  3 being set in line with the definition, and I believe  4 that the only orchestration that I suggest is to give  5 the contributing banks at a very senior level the  6 definition and say, "Please can you follow this."</b></p> <p>7 Q. It has gone slightly further than that, because you have  8 told Mr Storey that you have gone slightly further than  9 that, Mr Ewan?</p> <p>10 A. <b>I don't accept that.</b></p> <p>11 Q. Well, this is your telephone conversation.</p> <p>12 A. <b>At which I am asked: what have a bunch of other people  13 said? And I report on what a bunch of other people have  14 discussed and we don't even get as far as whether  15 they've agreed it.</b></p> <p>16 Q. What does, "No one's clean now" mean:  17 "No one's clean clean now, Miles".</p> <p>18 A. <b>I think that is an attempt at gallows's humour because  19 Miles and I both know that there have been a lot of  20 reports that LIBORs are not being set accurately.</b></p> <p>21 Q. Well, is it just reports that are not being set  22 accurately? Or is it -- just listen to my question --  23 are you accepting with Miles Storey on this transcript  24 that you know they are not being set accurately?</p> <p>25 A. <b>I don't know that LIBORs are being set inaccurately</b></p>	<p style="text-align: center;">Page 55</p> <p>1 <b>out: is there a central problem? Is LIBOR being quoted  2 in line with the definition?</b></p> <p>3 Q. Forgive me, Mr Ewan, my question is you wouldn't have  4 said that unless there had been some agreement at the  5 board meeting that what you have described there was  6 going to take place.</p> <p>7 A. <b>There may have been. I don't recall exactly what  8 happened at the board -- I don't, in fact, recall  9 anything that happened at that board meeting.</b></p> <p>10 Q. The intention as we see below Miles's entry:  11 "So the idea (you say) is to investigate if there is  12 anything that makes dollars unique and if it's not the  13 case see if we can gradually float the dollar rate  14 slightly, gently up."</p> <p>15 That was the agreement that appears to have been  16 arrived at the board.</p> <p>17 A. <b>And then we have a long piece where Miles discusses  18 issues that it must be -- that there cannot be  19 collusion.</b></p> <p>20 Q. Yes. We'll come to that in a moment. Can you just  21 focus on this for one moment, please? I am looking at  22 the meeting. At the meeting --</p> <p>23 A. <b>I can't recall. I accept it may have been discussed.</b></p> <p>24 Q. With the intention to float the dollar rate slightly up.</p> <p>25 A. <b>Right.</b></p>

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<p>1 Q. Do you agree?</p> <p>2 A. No, because it's: investigate if there is anything that</p> <p>3 makes dollars unique. And if that's not the case then</p> <p>4 we go on to see if the dollars can be floated up.</p> <p>5 Q. Now --</p> <p>6 A. But I don't accept that necessarily that ever -- I don't</p> <p>7 accept that there was necessarily any central strategy</p> <p>8 to try and float the dollars up.</p> <p>9 Q. All right. And then, in fairness to you, you rightly</p> <p>10 say that Miles draws to your attention concern on his</p> <p>11 part about collusion which is mentioned and we've heard</p> <p>12 in the transcript; yes?</p> <p>13 A. Mm-hm.</p> <p>14 Q. But in general terms -- we can look at the details, if</p> <p>15 necessary -- there is a discussion of who was present at</p> <p>16 the meeting, were they panel banks, were they not. And</p> <p>17 Miles is suggesting to you, you need at least the panel</p> <p>18 banks to have the effect.</p> <p>19 A. Yes, you would, and we also discuss that there can't be</p> <p>20 a concerted movement because that would be -- that would</p> <p>21 be wrong.</p> <p>22 Q. Well, he suggests that, doesn't he?</p> <p>23 A. Well, yes, and he happens to also be -- be chairman of</p> <p>24 the Foreign Exchange and Money Markets committee,</p> <p>25 I think, at this point.</p>	<p>1 is what your LIBOR is, can you please show me a trade</p> <p>2 that you've done that reflects this?"</p> <p>3 Q. If you look at page 11, internal page 11 of that</p> <p>4 document. At the top. He has given you -- he has made</p> <p>5 the comment at the top:</p> <p>6 "Get around the sort of collusion bit."</p> <p>7 A. Exactly, going and speaking bilaterally to banks</p> <p>8 saying: can you please demonstrate to me that your quote</p> <p>9 for LIBOR today is accurate.</p> <p>10 Me -- is a method of operating that absolutely</p> <p>11 wouldn't be collusive, because that's an individual</p> <p>12 conversation with the BBA going into a bank saying,</p> <p>13 "Please can you give me evidence that your LIBOR rates</p> <p>14 are being quoted in line with the definition."</p> <p>15 Q. You raise the issue, because on this page you are</p> <p>16 talking about adopting collusion and concerns about it,</p> <p>17 in the middle of the page you say:</p> <p>18 "My -- I mean, my take on that, Miles, is that if we</p> <p>19 have a quiet conversation with a bank and then the next</p> <p>20 day their LIBOR quote jumps 20 basis points. I think</p> <p>21 a journalist would ask two questions, one, are you</p> <p>22 having trouble funding yourself, if not, 2, were you</p> <p>23 effectively lying beforehand?"</p> <p>24 So, the quiet conversation, the bilateral</p> <p>25 conversation that you have referred to, you didn't raise</p>
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1 Q. But the meeting had already completed, hadn't it?

2 A. Yes.

3 Q. And I want to understand from your perspective whether

4 you knew steps were being taken by the participants in

5 that meeting in accordance with the agreement that

6 appears to have been reached.

7 A. Right I'm not -- I'm not -- I don't accept that there

8 has been an agreement reached and I think we can --

9 I think it's fair to state that when Miles raises the

10 issue I agree with him that collusion is a problem,

11 there should not be collusion and we can't have that.

12 Q. I am going to paraphrase, but if I do it inaccurately

13 I'll be corrected by my Lord or the Crown. He does say

14 that, but then he suggests a more indirect way in which

15 influence might be exerted. In other words, through the

16 people effectively doing the rates.

17 A. Doesn't he actually suggest that there should be direct

18 discussions between the BBA and individual banks --

19 Q. Yes.

20 A. -- on a -- in order to get them to back their LIBORS.

21 I.e. to give the BBA evidence that they are. Because

22 it's -- because Miles again, just like I don't, doesn't

23 know what the true rate is for another bank, and so the

24 suggestion that he makes is that the BBA should go to

25 individual banks and say, "Okay, if you think that this

 1 there with him the collusion point that he was making to  2 you in saying, "Yes, it's wrong." The points that you  3 drew to his attention were that the banks wouldn't do it  4 anyway for those reasons that you've set out.  5 A. Again, this is one of the central difficulties that BBA  6 faced in trying to operate a market rate which was  7 contributed to by our members.  8 Q. How extensive was the discussion at the board meeting  9 about these events that you are talking to Miles Storey  10 about?  11 A. I already said I don't recall the conversations at the  12 board.  13 Q. This is a pivotal time, isn't it, you are concerned  14 about the integrity of the rate? You have, as we have  15 looked at many times now, lots of reports about the  16 quality and accuracy of the rate; yes?  17 A. Yes.  18 Q. You've written your carrot and stick document. Angela  19 Knight has adopted the carrot and stick to an extent,  20 circulated that to the board; yes?  21 A. Yes.  22 Q. This is a critical time in your role as the director of  23 the BBA.  24 A. Right.  25 Q. Of the LIBOR rate. |

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<p>1    A. I already remember all those events because I have been  2    shown many pages that demonstrate it happened, I don't  3    recall individual conversations. I couldn't reconstruct  4    a conversation that took place about anything seven  5    years ago.</p> <p>6    Q. Let's look at 1214 -- sorry -- JEX/048, please. Sorry,  7    that's -- sorry, JEX/049. My fault, sorry.</p> <p>8       Now, these are the minutes, Mr Ewan -- all right? --  9       of that board meeting. Okay? The meeting that had  10      taken place before the call that we've just heard.</p> <p>11     A. Yes.</p> <p>12     Q. There are two issues that I want to ask you about in  13       relation to that. If we can scroll, please, to the  14       third page. Thank you:</p> <p>15       "Money market issues."</p> <p>16       There was a paper on frameworks, that's fine.</p> <p>17       I want to ask you about the next paragraph:  18       "All present agreed that setting accurate LIBOR is  19       reputationally important for contributor banks as well  20       as the rates themselves. Board members asked for a list  21       of members of the supervisory committee for the rates to  22       be circulated, in confidence (attached as appendix I).  23       In order to help quell uncertainty in the market the BBA  24       was asked to bring forward the scheduled annual review  25       of LIBOR. This will now take place on May 30."</p>	<p>1    Q. Yes. You've agreed, Mr Ewan, however that section that  2    we are looking at does not reflect the nature of  3    conversations that were had at that meeting.</p> <p>4    A. Well --</p> <p>5    Q. Do you agree that at least?</p> <p>6    A. I don't think -- well, I don't think that there is  7       anything in the minutes that is inaccurate, but I accept  8       that they don't reflect the entire of the conversation  9       about anything that happened at the board that  10      afternoon.</p> <p>11     Q. Do you remember an individual from distribution, one of  12       the bank's present, I am not suggesting the person that  13       is listed as being present, but an individual from  14       Deutsche, telling the board that derivatives regularly  15       affected LIBOR fixings?</p> <p>16     A. I already said I don't recall the conversations at that  17      board.</p> <p>18     Q. You have no recollection? It's quite a specific  19       allegation, you have no recollection that someone was  20       saying from Deutsche that derivatives have always had  21       an effect on, or affected, LIBOR fixings?</p> <p>22     A. I have already said, I don't recall any of the  23       conversation at that board meeting.</p> <p>24     Q. Can we look, please, at PMC/1583.</p> <p>25       I wonder if we could play, please, beside it,</p>
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<p>1       Now, have a look at the rest of the note if you care  2       to, but would you agree that that is the only reference  3       in that minute to the LIBOR discussions?</p> <p>4    A. Yes.</p> <p>5    Q. It does not, does it, reflect the nature of the  6       conversations that were had with the senior CEOs and  7       treasurers of the bank?</p> <p>8    A. Okay, I accept that it's different to it -- the written  9       note there, it's essentially one paragraph, doesn't  10      contain all of the discussion that I reflected to  11      Miles Storey.</p> <p>12     Q. I just want to understand, was that not noted for  13       a particular reason?</p> <p>14     A. I couldn't say. I -- I don't believe I was responsible  15       for the minutes of this meeting.</p> <p>16     Q. Well, let's not beat about the bush, was the  17       conversation had with the CEOs off record?</p> <p>18     A. What do you mean by "off record"?</p> <p>19     Q. Well, do you not understand the meaning of the word "off  20       record"? In other words, not officially recorded, we  21       will have a quiet conversation.</p> <p>22     A. Well, this is a 3-page document that reflects two hours  23       one assumes of conversations I think the boards lasted  24       for an hour or two hours, so not everything is minuted.  25       I mean that's -- that's commonplace.</p>	<p>1       PMC/1582.</p> <p>2       MR CHAWLA: Page 214.</p> <p>3       MR JUSTICE COOKE: Thank you.</p> <p>4                          (Audio transcript played)</p> <p>5       MR HAWES: I wonder if we could pause at that point. It  6       goes on for a few more pages and I note the time.</p> <p>7       MR JUSTICE COOKE: It is probably sensible just to finish  8       the recording, isn't it?</p> <p>9       MR HAWES: Yes.</p> <p>10                        (Audio transcript continued)</p> <p>11       MR HAWES: A convenient moment, my Lord?</p> <p>12       MR JUSTICE COOKE: If that works for you.</p> <p>13       MR HAWES: Yes. Certainly, I'll ask questions after lunch.</p> <p>14       MR JUSTICE COOKE: Very good. 2.10 pm, please, members of  15       the jury. Thank you very much.</p> <p>16                        (1.15 pm)</p> <p>17                        (The short adjournment)</p> <p>18                        (2.10 pm)</p> <p>19                        (Proceedings delayed)</p> <p>20                        (2.20 pm)</p> <p>21       MR HAWES: I wonder if we can have PMC/1583 on the screen,  22       please. Just whilst that is being brought up, Mr Ewan,  23       I did just want to correct one thing. I suggested to  24       you -- and I correct myself -- I suggested to you this  25       was a person from Deutsche, all right? I may have been</p>
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<p>1      in error about that, but I want to ask you again about      2      the meeting at the board that this is talking about. So      3      if we turn to page 5 of that transcript, please, and      4      towards the bottom part of that.</p> <p>5      Now, we can see just where the hand was there, where      6      it talks about manipulating. Do you see that? No, go      7      up slightly, please, just in the middle of the page.      8      Now, the talk that some institutions are manipulating      9      LIBORs. Do you see that, Mr Ewan?</p> <p>10     A. Yes.</p> <p>11     Q. This is him talking to you. I have had it all played,      12     so the context is fair and accurate to you because of      13     your responses to this, okay? Do you understand?</p> <p>14     A. Yes.</p> <p>15     Q. It continues:</p> <p>16     "I think there is someone from the BBA that was in      17     a meeting with, as I said, Charles Aldington,      18     yesterday."</p> <p>19     Just pausing there, he is the chair of Deutsche, is      20     that right?</p> <p>21     A. I think elsewhere Mr Nicholls says that      22     Charles Aldington is the chairman of Deutsche Bank UK.</p> <p>23     Q. Yes. And he was present -- we can go back to      24     the minutes if you require us to -- but he was present      25     at the minutes we looked at this morning; okay?</p>	<p>1      Q. You clearly knew at the time.      2      (Pause)</p> <p>3      A. I think probably, but I may have been speculating at the      4      time. I --</p> <p>5      Q. Well, you're reflecting on a conversation that you had      6      heard, I suggest -- you can disagree with me if you      7      choose to -- had taken place at the board meeting the      8      day before.</p> <p>9      A. That may be. I don't have a recollection of the      10     specifics of the conversation, and I don't think there      11     is enough information here for us to reconstruct it with      12     any certainty.</p> <p>13     Q. Well, I want to just ask you about that. Have you ever      14     seen a note of the board meeting in which that comment,      15     made by whoever he is, has been recorded?</p> <p>16     A. I don't think I have.</p> <p>17     Q. But it clearly was said because you are saying that to      18     Mr Nicholls.</p> <p>19     A. I think that's the case, but I can't be certain.</p> <p>20     Q. What did you mean by, "I don't necessarily think he's      21     wrong"?</p> <p>22     A. I don't know.</p> <p>23     Q. Because that would disclose, I suggest, Mr Ewan,      24     knowledge of type 3 activity, wouldn't it?</p> <p>25     A. I -- I don't remember.</p>
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<p>1      A. Okay.</p> <p>2      Q. "... That described himself as a former trader and he      3      knows how these things work, and guys are manipulating      4      it to make PNL."</p> <p>5      I suggest that means profit and loss.</p> <p>6      A. Yes.</p> <p>7      Q. "... Is, you know, so far from factual, and I suggest      8      that you know and I don't know who, who it was that      9      makes those representations but if you're going to be      10     a top trader then you're not going to be you know making      11     those types of comments ..."</p> <p>12     Now, I asked you this morning about whether      13     someone -- I put it as someone from Deutsche but I may      14     be in error about that, okay -- had made a comment to      15     that effect at the board meeting.</p> <p>16     Does this help you remember that event?</p> <p>17     A. No.</p> <p>18     Q. You respond:</p> <p>19     "I think that, I think that, well, he, he was      20     a number of years ago and I think possible and, you      21     know, I don't necessarily think he's wrong, I think the      22     games moved since when he was in the game a decade or      23     15 years ago."</p> <p>24     Who is the "he"?</p> <p>25     A. I'm afraid I don't remember.</p>	<p>1      Q. Let's look at the face of the document. Put it in its      2      proper context. The gentleman from Deutsche is      3      suggesting, in fact, this doesn't take place; okay?</p> <p>4      A. Right.</p> <p>5      Q. So, your point is that no bank ever admits it; yes?</p> <p>6      Your point being that there was never any admission      7      by anyone to you about this type of activity. Do you      8      understand?</p> <p>9      A. Banks colluding together to --</p> <p>10     Q. Yes.</p> <p>11     A. I don't believe I ever came across that.</p> <p>12     Q. Right, and on the face of the transcript he is saying,      13     in essence, this is so far from the truth; yes?</p> <p>14     A. That there is --</p> <p>15     Q. Gentlemen here, saying to you it is so far from the      16     truth.</p> <p>17     A. Yes, so he is saying he doesn't believe it happens.</p> <p>18     Q. But the point about this transcript shows, I suggest,      19     that there was that disclosure the day before.</p> <p>20     A. I don't know.</p> <p>21     Q. Well, when he raises it about the meeting the day      22     before, you're not saying to him, are you, "I don't know      23     what you're talking about"? What you are saying, and      24     I paraphrase it, is, "Well, I think he's been out the      25     market for a number of years", whoever "he" is; yes?</p>
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<p>1 I mean, I am paraphrasing it but isn't that the purpose 2 for the --</p> <p>3 <b>A. Okay, I don't recall the details of what happened at</b> <b>4 that meeting.</b></p> <p>5 Q. All right. So, you don't recall the detail at that 6 meeting. Looking at this note now, you clearly didn't 7 contradict this gentleman when he said, "That event had 8 taken place at the board meeting".</p> <p>9 <b>A. That's correct, I didn't contradict him.</b></p> <p>10 Q. And indeed you say, "I don't necessarily think he's 11 wrong". That's a reference to fixing against 12 derivatives for profit and loss, the game's moved since 13 when he was in the game a decade or 15 years ago. 14 Yes?</p> <p>15 <b>A. That's what the transcript of this conversation says,</b> <b>16 correct.</b></p> <p>17 MR CHAWLA: My Lord, sorry just to be accurate, I don't 18 think there's a reference to fixing against derivatives 19 there.</p> <p>20 MR HAWES: "Guys are manipulating [put it in its proper 21 context] to make profit and loss."</p> <p>22 What did you understand that to mean?</p> <p>23 <b>A. I don't -- I don't know.</b></p> <p>24 Q. Moving LIBORs to make profit and loss, isn't it?</p> <p>25 <b>A. That's what he says.</b></p>	<p>1 they missed the fact that 12-month dollars jump 20 basis 2 points."</p> <p>3 That refers, doesn't it, back to the conversation 4 that we looked at and heard this morning between you and 5 Mr Storey. And the increase of the dollar rate.</p> <p>6 <b>A. Yes.</b></p> <p>7 Q. Do you agree with that?</p> <p>8 <b>A. I think it probably is.</b></p> <p>9 Q. If we scroll up, please. No, into the middle, please. 10 Thank you. Alex Merriman to you at 12.40 pm of the same 11 day quotes:</p> <p>12 "Not an altogether negative story. Think again, we 13 have done something positive to shake up the market, no 14 matter what our colluding members think."</p> <p>15 If we go to the top of the page, you respond to 16 that:</p> <p>17 "Alex, I think you might want to ask Richard or Dave 18 to retract or completely delete the e-mail below.</p> <p>19 "Of course your e-mail is internal, but it would be 20 too easy for any recipient to accidentally forward it 21 out of the company. This sort of thing has happened to 22 me before.</p> <p>23 "I'm paranoid about this, I know, but as we've seen 24 lately, reputations can be tarnished without evidence at 25 the moment."</p>
<p style="text-align: center;">Page 69</p> <p>1 Q. And at that stage, you are saying to him you didn't 2 necessarily think that he was wrong in the comments that 3 he was making that the game had moved on. In other 4 words, you recognised the possibility of manipulation 5 for profit and loss.</p> <p>6 <b>A. Well, there's not -- I don't think I necessarily focused</b> <b>7 on the PNL, but as we know at the time we had a number</b> <b>8 of reports that the LIBORs -- LIBORs were inaccurate,</b> <b>9 that there was type 2 behaviour or low-balling which is</b> <b>10 manipulation. I -- and that's why we had the</b> <b>11 consultation and took all the action that we took to try</b> <b>12 and ensure that LIBORs were quoted in line with the</b> <b>13 definition.</b></p> <p>14 Q. I wonder if we can now turn, please, to JEX/052. If we 15 look at the bottom e-mail first, please. Actually, if 16 we can just scroll -- thank you -- to the top of that 17 header, please. Over the next page. No, over the next 18 page. Thank you.</p> <p>19 Now, this is 17 April. The Bloomberg story on 20 dollar rates. And the story appears below but I don't 21 need to take you to that necessarily, it's your comment 22 at the top. This is internal, isn't it, to the BBA 23 members, Mr Ewan, is that right?</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. "This is exactly the story we thought they'd run and</p>	<p style="text-align: center;">Page 71</p> <p>1 Why were you so concerned about Mr Merriman 2 describing your members as "colluding"?</p> <p>3 <b>A. Because I don't think we had any evidence that our</b> <b>4 members were colluding.</b></p> <p>5 <b>However, if an e-mail from a member of the BBA to</b> <b>6 another member of the BBA says that there is collusion,</b> <b>7 my view was that would be reported as: the members are</b> <b>8 colluding. I actually note that my worry is because</b> <b>9 reputations can be tarnished without evidence.</b></p> <p>10 Q. Firstly, whose reputations are you talking about there?</p> <p>11 <b>A. LIBORs, individuals at the BBA, BBA member banks.</b></p> <p>12 Q. Because the day before at the board meeting, as we've 13 looked at this morning, I suggest not recorded, was 14 evidence of an agreement, to use your words, to "float 15 the dollar rate".</p> <p>16 <b>A. I don't accept that that was ever agreed on, and I state</b> <b>17 again that my comment here, "Reputations can be</b> <b>18 tarnished without evidence", means that I do not think</b> <b>19 that there is evidence. However, it would be taken as</b> <b>20 evidence if it was shown to a journalist, for example.</b></p> <p>21 Q. Well, let me ask you this, let me rephrase the 22 question: why would Alex Merriman write to you in those 23 terms? Why would he use that word?</p> <p>24 <b>A. I don't know. You would need to ask Alex.</b></p> <p>25 Q. Yes. It's an unusual word to use, isn't it?</p>

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<p>1 A. I really don't think I can comment on what somebody else 2 has written.</p> <p>3 Q. No, but the point is this, Mr Ewan: what was taking 4 place internally and knowingly taking place internally 5 at the BBA on 16 and 17 April that you can assist us 6 with, that's why I asked the question. Of course, you 7 can't know precisely why you used it, but does that 8 reflect what the view was internally at the BBA at that 9 stage?</p> <p>10 A. My view at that stage was that, as was discussed in the 11 conversation with Miles Storey, that we went through 12 this morning, is that any action taken collectively to 13 try and move LIBOR rates in one direction or another 14 would be wrong.</p> <p>15 Q. Who are Richard and Dave?</p> <p>16 A. I think that is probably the -- the BBA IT guys.</p> <p>17 Q. Can we move, please, to JEX/054. Around the same time, 18 same date, you, Mr Ewan -- I'm afraid we don't have this 19 in audio. We'll just have to read through it.</p> <p>20 Clive Jones was who?</p> <p>21 A. Clive Jones was the Foreign Exchange and Money Markets 22 committee member from Lloyd's.</p> <p>23 Q. Thank you.</p> <p>24 (Transcript read)</p> <p>25 Q. Just turning back to page 4 of that. Firstly, I should</p>	<p>1 definition would be what he describes at line 108 to 111 2 on that page.</p> <p>3 Q. Yes.</p> <p>4 A. And he's saying, "You can't do that because there aren't 5 offers in the market of three or four hundred million in 6 whatever currency at a 1 year tenor."</p> <p>7 So, we've discussed this idea about the spirit of 8 the definition which he identifies as something that 9 means you have a -- and at line 129 -- a "significant 10 degree of integrity".</p> <p>11 Q. Do you remember I asked you at the outset, when I was 12 asking you questions, to focus on some of the answers 13 that you have given to my learned friend, one of which 14 was: were you ever prepared to let the definition be 15 ignored or not adhered to?</p> <p>16 A. And I think we described at length that we felt that 17 there was, implicit within the definition, a concept of 18 the spirit which we also never managed to quite quantify 19 because it's a spirit, it's not a -- it's not something 20 that you can define. But I think this is what Clive is 21 speaking about. And I think if you are within the 22 spirit of the definition I don't think you are allowing 23 the definition of LIBOR to be ignored.</p> <p>24 Q. Well, it's a question I have asked you before, but who 25 determines it?</p>
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<p>1 ask you, the document that is being toned down, do you 2 know what it is?</p> <p>3 A. I couldn't say for certain, but I'll accept that it is 4 likely to be one of the documents that we spoke about 5 this morning.</p> <p>6 Q. Thank you.</p> <p>7 He is, at page 4, internal page 4 of 5, so if we 8 can -- towards the bottom of that. Thank you:</p> <p>9 "We've talked about this before, it's not exactly 10 the definition but it's the spirit of the definition."</p> <p>11 Now, did you get that from him or did he get that 12 from you?</p> <p>13 A. Get -- get what?</p> <p>14 Q. The "spirit of the definition".</p> <p>15 A. I -- what do you mean by, "Did he get the spirit of the 16 definition"?</p> <p>17 Q. Well it's an expression, isn't it, you've used it in 18 evidence to my learned friend and you've used it in 19 evidence when I've been asking you questions? I want to 20 ask where the expression comes from. Is it yours, is 21 it his, is it someone else's?</p> <p>22 A. I couldn't tell you who first used that expression.</p> <p>23 Q. Clearly, he is saying, "Not exactly the definition". In 24 their approach to their LIBORs.</p> <p>25 A. So, the definition would be a -- perfectly following the</p>	<p>1 A. And again, we discussed this at some considerable 2 length, and it is not -- ultimately it's determined, I 3 guess, by the Foreign Exchange and Money Markets 4 committee as we've said because they're the people who 5 are to act if they feel that people aren't operating 6 within the spirit of the definition or the definition.</p> <p>7 Q. Can we go to JEX/055, please. Just so you can see what 8 this is, Mr Ewan, this is I think, I suggest, obviously 9 it's a summary, of the 2008 panel bank review, as you 10 can see at the top; yes?</p> <p>11 A. Yes.</p> <p>12 Q. Did you prepare this?</p> <p>13 A. I doubt it.</p> <p>14 Q. But it reflects the meetings -- some of which we're 15 going to look at, but not in great length, we've looked 16 at one already -- it reflects the panel bank meetings 17 that you were having over this time.</p> <p>18 A. Yes.</p> <p>19 Q. Let's just touch on one or two matters in it. At the 20 very start:</p> <p>21 "A general consensus is that US dollar LIBOR is 22 currently inaccurate by 20-30 basis points while pound 23 and euro is, within reason, reliably accurate. This is 24 due to current market pressures leading banks to post artificially low rates to protect themselves, causing</p>
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<p>1 many questions US dollar LIBOR reliability."</p> <p>2 "Artificially" means what?</p> <p>3 <b>A. I don't know.</b></p> <p>4 Q. Well, it means not accurate, doesn't it?</p> <p>5 <b>A. So, I think this comes back to -- it's -- it was, at the</b>  <b>6 time, very difficult to actually state that in</b>  <b>7 a completely quantifiable way because we didn't know</b>  <b>8 exactly what an accurate LIBOR would be.</b></p> <p>9 Q. You didn't know what an accurate LIBOR was going to be</p> <p>10 but you did know it was artificial.</p> <p>11 <b>A. That may mean that it's artificial because there isn't</b>  <b>12 a cash market and LIBOR is a cash rate.</b></p> <p>13 Q. I just want to deal with that sentence, as well. You or</p> <p>14 your colleague has summarised it as US dollar, pounds</p> <p>15 and euros. Those were the big, main currencies that the</p> <p>16 banks traded?</p> <p>17 <b>A. Dollar, sterling and euro?</b></p> <p>18 Q. Yes.</p> <p>19 <b>A. Yes, I think so.</b></p> <p>20 Q. Thank you.</p> <p>21 Under the template of discussions we have LIBOR</p> <p>22 fixings, this is what you looked at with the panel banks</p> <p>23 I understand; yes?</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. So, you would have asked them about their perceptions.</p>	<p>1 You then refer to a lack of confidence in the middle</p> <p>2 of the page.</p> <p>3 Then what effect that has from a banking</p> <p>4 perspective, for the banks, due to them not knowing</p> <p>5 their own debt. Continually increasing write-offs and</p> <p>6 possible defaults of markets, the central banks and the</p> <p>7 regulatory bodies.</p> <p>8 And below that, that there is a fundamental</p> <p>9 dislocation between lenders and borrowers and that banks</p> <p>10 are risk-averse and less willing to lend, so if they do</p> <p>11 it must be at a price that covers the increased risk of</p> <p>12 an unsecured loan.</p> <p>13 The bullet below that -- but if there's anything you</p> <p>14 want to pick out of that please Mr Ewan please do so:</p> <p>15 "But are these funds really that expensive and even</p> <p>16 100 basis points for long-term loan. If it keeps the</p> <p>17 balance sheet in good health and the knock-on in</p> <p>18 confidence short as little to long term health."</p> <p>19 I want to go over the page please and focus on the</p> <p>20 market fixings:</p> <p>21 "Pound and euro are relatively accurate. Dollar</p> <p>22 LIBOR rates are currently artificially low by 20-30</p> <p>23 basis points.</p> <p>24 "Evidence shown to prove banks submitting their</p> <p>25 offered rate and then enter the market at a higher rate,</p>
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<p>1 to reference.</p> <p>2 "Underlying incentive to quote low.</p> <p>3 "Favour treasury.</p> <p>4 "Favour derivatives.</p> <p>5 "Little to no accountability."</p> <p>6 Now, was that said to you at the relationship</p> <p>7 meeting, as summarised here?</p> <p><b>A. I -- I while agree that, yes, there could be -- some people could say that there is an incentive to quote low.</b></p> <p>Q. What does "favour treasury" -- we have the reference to "treasury" again -- what does that mean?</p> <p><b>A. I don't know.</b></p> <p>Q. What is the meaning of the word "favour derivatives"?</p> <p><b>A. It could mean that there is an incentive to quote low because it -- it means that the cost of funds to the treasury goes down.</b></p> <p>Q. It creates a link, doesn't it, Mr Ewan, between the LIBOR submission and a commercial incentive. Would you agree with that proposition or not?</p> <p><b>A. Yes, I grant that it could.</b></p> <p>Q. Therefore LIBORs were not devoid of commercial pressure. Or LIBOR fixings were not devoid of commercial pressure. Would you agree?</p> <p><b>A. Yes, but I don't think it's fair to say that therefore</b></p>	<p>1 Q. So, correct me if I'm wrong, let me understand what</p> <p>2 you're saying. The person who may want to answer to</p> <p>3 this document is either Mr Merriman; yes? Or Ms Knight.</p> <p>4 Because this is not your document.</p> <p><b>A. Yes. I also don't think either of them wrote it.</b></p> <p>Q. Well, who do you think wrote it?</p> <p><b>A. Well, I -- I am --</b></p> <p>Q. I can assist you, why don't you look at the footer of</p> <p>the document?</p> <p><b>A. I was going to say it looks like it has been retrieved from Peter Denton's drive.</b></p> <p>Q. And Peter Denton, as we know, was your assistant.</p> <p><b>A. Yes, he was probably in his first year at the job at that point.</b></p> <p>Q. And was this document written for the FX committee?</p> <p><b>A. That's what these documents ultimately were for, yes.</b></p> <p>Q. Yes. And I'm assuming as the secretariat to the FX committee you wouldn't have put something in front of them from the BBA's perspective unless you had read it?</p> <p><b>A. Okay. I'm -- but --</b></p> <p>Q. Well, is that accurate or not? Would you have put something in front of the FX committee, as its secretariat, unless you had read it?</p> <p><b>A. No.</b></p> <p>Q. So, if this document has been prepared by Mr Denton, for</p>
<p>Page 81</p> <p>1 <b>the banks would have quoted artificially low. They knew what the definition was and they knew what was expected of them.</b></p> <p>Q. But here you are recording --</p> <p><b>A. I'm not recording this, I don't think I wrote this document.</b></p> <p>Q. All right. It is a BBA document that records, concerning LIBOR, for which you are in charge, the underlying incentive to quote low for commercial reasons.</p> <p><b>A. Well, I'm not sure that, at this point, you could say that I am in charge. I would certainly grant that I worked on LIBOR at this time, and I think if anybody is in charge of LIBOR it's the committee.</b></p> <p>Q. Well, this is 2008, you've been in your employment since 2006. As I understand it, Mr Merriman has relinquished control, from the BBA's perspective, of LIBOR and that has fallen to you; correct?</p> <p><b>A. I think for the entire period that Alex Merriman was at the BBA -- as the executive director, my manager, I think it was within his portfolio of jobs -- of roles the whole time. I couldn't aver that without seeing his job description or whatever.</b></p> <p><b>And certainly by this point the CEO of the BBA is taking a deep and personal interest in LIBOR. So --</b></p>	<p>Page 83</p> <p>1 the purposes of putting it in front of the committee, you would have read it?</p> <p><b>A. Yes, and I would therefore suggest that this is not a document that in this form, would have been shown to the committee because, as I have said, I don't think I had evidence that banks were submitting rates and then taking money at a higher rate.</b></p> <p>Q. I think I should ask you, just for clarity's sake, would this not have gone in front of the FX committee in this format, because it was too blunt?</p> <p><b>A. No. That's not what I'm saying.</b></p> <p>Q. Well, I know it's not what you're saying but I want you to ask you to clarify it. Would it have not have gone in this format because it was too blunt?</p> <p><b>A. No, it would not have gone in this format because I don't think that I could demonstrate that some of the comments in this are accurate.</b></p> <p>Q. Can we just look at the footer again for one moment. This is the final version.</p> <p><b>A. Well, Peter Denton may have thought it was the final version.</b></p> <p>Q. I am going to ask you: does that mean there were a number of iterations of this document before it was given that title?</p> <p><b>A. I don't know.</b></p>

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<p>1 Q. It clearly, as I've suggested to you, identifies      2 commercial incentives are related to LIBOR fixings.      3 I think you agree with that now, don't you?  <b>4 A. Yes, I don't -- yes. I won't -- but that doesn't mean      5 it would be right for a bank to submit a lower LIBOR      6 rate or a different -- anyway, a different LIBOR rate,      7 higher or lower, to the way its actual cost of funds.</b>      8 Q. Just bear with me for one moment, please.      9 (Pause)      10 I wonder now if we can turn, please, to JEX/57.      11 I wonder if we could just go to the bottom of that      12 e-mail chain first, please. Thank you. No, slightly      13 above. Thank you.      14 This is initially Simon Hill's internal to      15 Mr Merriman, and I am showing you this, Mr Ewan, because      16 you will get copied into the e-mail chain eventually;      17 okay? But in the first instance it's him to Mr Merriman      18 only; all right?      19 But just to satisfy yourself on the printed      20 document, you do appear above within the chain. Are you      21 happy with that?  <b>22 A. Yes.</b>      23 Q. Thank you.      24 "Hi Alex, just [I should say this is 25 April] just      25 attended the GAG at which the subject of LIBOR came up.</p>	<p>1 "All, have you seen my e-mail about LIBOR? It      2 should have gone around today. The issue won't mend on      3 its own. We need to handle it and that includes canning      4 the journos and finding credible ways of saying that we      5 have fixed it. I will send my e-mail again. Thanks,      6 Angela."      7 Then finally your e-mail in this chain, this is to      8 Angela but the other recipients:      9 "All, I met several representatives of the Fed      10 yesterday and we had a very positive discussion. They      11 have concerns about LIBOR but would rather participate      12 in a process to ensure it is accurate going forward and      13 try and replace it. The CME feels the same."  <b>14 A. Chicago Mercantile Exchange.</b>      15 Q. They are an exchange that deals significantly in      16 derivatives, is that right?  <b>17 A. Correct.</b>      18 Q. "In our travels around the city talking to contributor      19 banks, Peter and I have discussed many ideas to ensure      20 that the rates are accurate going forward. I will have      21 a paper discussing these completed early next week.      22 "I spoke to Brian M yesterday and asked him to talk      23 to some senior members of the FX and Money Markets who      24 run the committee about what they think we should say in      25 the press.</p>
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<p>1 they have concerns about LIBOR.</p> <p>2 <b>A. Yes.</b></p> <p>3 Q. So, what could that possibly mean in this context?</p> <p>4 <b>A. Well, in this context, which seems to be a discussion</b></p> <p>5 <b>about the media presentation -- media's commentary on</b></p> <p>6 <b>LIBOR -- I imagine their concerns are: is what we're</b></p> <p>7 <b>reading in the press true?</b></p> <p>8 Q. And this, if I may suggest, illustrates the type of</p> <p>9 activity that was going on within the BBA to try to</p> <p>10 manage the publicity about LIBOR. Would you agree with</p> <p>11 that?</p> <p>12 <b>A. Certainly we wanted to try and manage the press -- the</b></p> <p>13 <b>way that the press was writing about LIBOR, yes.</b></p> <p>14 Q. If I were to suggest there is a fracture between the</p> <p>15 managing of the press and what you were being told by</p> <p>16 your own members, would you agree with that?</p> <p>17 <b>A. I'm not sure I precisely understand what you mean by</b></p> <p>18 <b>"fracture".</b></p> <p>19 Q. Well, there's a difference?</p> <p>20 <b>A. Yes, I will -- yes, I will happily allow that.</b></p> <p>21 Q. I mean --</p> <p>22 <b>A. Because at this time we have seen a number of cases</b></p> <p>23 <b>where it was widely believed at the time, including</b></p> <p>24 <b>I think perhaps in the BBA, that otherwise perfectly</b></p> <p>25 <b>healthy banks had been broken by sensationalistic media</b></p>	<p>1 "Dear all, as you know, we discussed LIBOR at the</p> <p>2 board meeting in April, primarily in respect of some of</p> <p>3 the inaccuracies for contributing banks relating to the</p> <p>4 dollar rate. Due to the high levels of volatility and</p> <p>5 uncertainty in the markets the BBA has brought forward</p> <p>6 the full review of LIBOR and although not concluded we</p> <p>7 are shortly going to provide analysis and recommend some</p> <p>8 changes. Particularly in respect of increasing the</p> <p>9 numbers of contributors and looking at the median</p> <p>10 collection rather than the current average. There may</p> <p>11 be some other changes, as well, surrounding definitions.</p> <p>12 These will be [I think taken it should be] taken to the</p> <p>13 FXMMC on which each of your organisations have a seat.</p> <p>14 "Following that board meeting the announcement of</p> <p>15 the review and my subsequent letter to each of the</p> <p>16 contributors, the dollar LIBOR rate improved, and by</p> <p>17 this I mean it drifted upwards to what was considered to</p> <p>18 be a more accurate market rate. However, unfortunately</p> <p>19 it has not stayed there.</p> <p>20 "Over the last few days we have had a number of</p> <p>21 calls, particularly from brokers and the derivatives</p> <p>22 community, commenting on the rate contributions of some</p> <p>23 of the banks and others tell us is not possible to</p> <p>24 borrow at a rate even near that of dollar LIBOR.</p> <p>25 "In a nutshell they consider that the rates are</p>
<p>Page 89</p> <p>1 reporting. So there was a particular concern about the</p> <p>2 way that the media wrote about financial issues.</p> <p>3 Q. Just bear with me for one moment, please.</p> <p>4 I am going to jump some documents, so I wonder if we</p> <p>5 can go to JEX/063.</p> <p>6 Now, this is an internal BBA e-mail on 2 May. Would</p> <p>7 you have been on the BBA distribution list?</p> <p>8 <b>A. Probably.</b></p> <p>9 Q. This is Ms Knight, although it's sent Helena Dillon</p> <p>10 I think her name is. Was one of her PAs, is that right?</p> <p>11 <b>A. Correct.</b></p> <p>12 Q. 2 May 2008, "Dear all", this is internal, do we agree?</p> <p>13 <b>A. Err --</b></p> <p>14 Q. Internal only?</p> <p>15 <b>A. I don't think this is internal only, no.</b></p> <p>16 Q. So, this is -- on the distribution list you could have</p> <p>17 who, then, precisely?</p> <p>18 <b>A. I don't know. I am merely commenting, I don't think</b></p> <p>19 <b>it's internal because the last sentence in paragraph 1</b></p> <p>20 <b>says:</b></p> <p>21 <b>"The Foreign Exchange and Money Markets committee on</b></p> <p>22 <b>which each of your organisations have a seat."</b></p> <p>23 <b>Which seems to indicate it's not an internal</b></p> <p>24 <b>document.</b></p> <p>25 Q. Yes.</p>	<p>Page 91</p> <p>1 inappropriately low and that in some instances they have</p> <p>2 given us the names of banks that posted one rate and</p> <p>3 subsequently borrowed at a materially higher rate. As</p> <p>4 a result we have had another flurry of articles about</p> <p>5 LIBOR, both in the Wall Street Journal and the FT."</p> <p>6 I think it should say:</p> <p>7 "In addition we are now receiving anecdotal stories</p> <p>8 that as it is not possible to find funds at the dollar</p> <p>9 rate then other benchmarks need to be used.</p> <p>10 "I am well aware that the real concern can often</p> <p>11 be -- and particularly at trading desk level -- that if</p> <p>12 a bank posts a rate that is not in with the pack then it</p> <p>13 may get crucified in the press and there is of course a</p> <p>14 need for your treasury department to square their book</p> <p>15 each day. However, there is now a real issue.</p> <p>16 "Lastly, I am told that a number of you have either</p> <p>17 contacted directly or been contacted by [REDACTED] with a view</p> <p>18 to participating in their rival index. I am further</p> <p>19 informed that at least two of the banks on this e-mail</p> <p>20 have actually actively asked [REDACTED] to commence this</p> <p>21 alternative to LIBOR. This fills me with concern.</p> <p>22 I was under the impression that the agreement was that</p> <p>23 we got accuracy into LIBOR through ensuring that the</p> <p>24 rates the contributing banks posted were accurate and on</p> <p>25 a continuous basis. I was not of the understanding that</p>

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<p>1 the accuracy was merely intended to last for a few days      2 and that there was active consideration in providing      3 an alternative."</p> <p>4 Can I ask you again -- sorry, I was over the page:      5 "Can I ask you again that you do what is necessary      6 with the your organisation to effect appropriate rates      7 to be set and perhaps I could also suggest that as      8 a next step we ask for the treasurers of all the      9 contributing banks to come to a meeting at the BBA at      10 some point in the next 7 to 10 days. I would be      11 grateful for your comments."</p> <p>12 Can I go back to the beginning of that document,      13 please, Mr Ewan. I just want to touch on it so your      14 evidence is clear. In respect of some of the      15 inaccuracies in quotes from contributing banks what, if      16 anything, do you say about that?</p> <p>17 <b>A. Well, what I would say about this entire note is that it was written by Angela Knight and I think it would be appropriate, if anyone is to comment on this, for Angela to -- Knight herself to comment on it.</b></p> <p>18 Q. I accept Angela Knight was above you in terms of she was      19 the head of the BBA; yes?</p> <p>20 <b>A. Yes.</b></p> <p>21 Q. The CEO. But you had responsibility for LIBOR within      22 the BBA; yes? That was your job.</p>	<p>1 <b>and that is --</b>      2 Q. Sorry, I cut you off. Sorry. Carry on.      3 <b>A. -- and that is what I was trying extremely hard to do throughout 2007 and 2008.</b>      4 Q. In the middle of that, following the board meeting,      5 that's why I suggested to you it harks back to your      6 conversation with Mr Storey that the dollar LIBOR rate      7 improved; that relates to the release of the publicity,      8 that relates to the fact that Bloomberg had put      9 something out on the wires, and it harks back to the      10 conversation that you were having with Miles Storey that      11 we heard this morning.      12 <b>A. Where we both agreed that it would be deeply inappropriate to collude in any way to try and affect the dollar rates.</b>      13 Q. Well, I'll leave that.      14 She also expresses concern, which is the other thing      15 that drives this letter, I suggest, that others may be      16 abandoning the LIBOR rate and going to an alternative.      17 <b>A. Yes.</b>      18 Q. Is that reflecting the commercial side of the BBA's      19 concern about LIBOR?      20 <b>A. I don't think that's a commercial concern, I think it may be a reputational concern. However, I recall that when I was asked -- when I was discussing with Angela</b></p>
<p>21 Page 93</p> <p>1 <b>A. Yes. And, as I've said, Angela Knight was, by this point, fully engaged and was very hands on, and this is Angela Knight writing a note to the contributing banks. And I don't have any precise memory, but it would have been unusual for Angela to have -- well, there was no requirement for Angela to consult with me. She was the Chief Executive and she was --</b></p> <p>22 Q. The point, Mr Ewan, is this: is she, as the CEO of the BBA, inaccurately reflecting the position at the time? She's not going to is she? She's the CEO of the BBA.</p> <p>23 <b>A. I'm not -- I -- I'm sorry, I believe if you want to -- I mean, I don't know exactly how this works, but if you want to ask questions about something that Angela Knight wrote is it not more appropriate to ask these questions of Angela Knight?</b></p> <p>24 Q. I'll resist responding to that.</p> <p>25 Was she accurate in her note about the inaccuracies for contributing banks on the dollar rate?</p> <p>19 <b>A. I have --</b></p> <p>20 Q. It's a theme, isn't it?</p> <p>21 <b>A. It is a theme, yes. Absolutely it's a theme and I've not -- I've not for a moment sought to say anything other than we were very concerned about what we were hearing going on in the market and we wanted to ensure that banks were quoting LIBOR to the LIBOR definition</b></p>	<p>21 Page 95</p> <p>1 <b>Knight the appropriate line to take, when discussing this [redacted] rate, was that the BBA welcomed the competition and it was perfectly appropriate for there to be more than one rate. And I believe, I shouldn't show you examples, but I believe I am quoted saying that or words to that effect.</b></p> <p>22 Q. Turn to JEX/065, please. I want to just touch on this, the jury will understand why. This was one of the relationship meetings that you had and present at that meeting was Mr Thursfield; all right?</p> <p>23 <b>A. Yes.</b></p> <p>24 Q. He was a member of the FXMMC?</p> <p>25 <b>A. Yes.</b></p> <p>14 Q. I just want to touch on what was said to you at the particular meeting with Citibank.</p> <p>16 "LIBOR is but one factor in the current crisis. Everything effected. LIBOR reflects current stress. Markets frozen especially in US dollar. 1 month only because of Taff auction."</p> <p>20 Just pausing there, Taff auction is what?</p> <p>21 <b>A. It's funding provided by the US central bank to US market participants.</b></p> <p>23 Q. Thank you:</p> <p>24 "Cannot fix a frozen market so LIBOR is wrong. Brokers are not a reliable source for quoting LIBOR</p>

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<p>1       rates. Brokers are not seeing any movement. More money  2       to be made from higher LIBOR. Incentive to quote  3       lower."</p> <p>4       Now, the last two bullet points, do you now  5       understand what "more money to be made from higher  6       LIBOR" meant?</p> <p>7       <b>A. He is suggesting that you can make more money if you  8       quote a higher LIBOR.</b></p> <p>9       Q. And?</p> <p>10      <b>A. And there is an incentive to quote lower.</b></p> <p>11      Q. Well, are the two related to one another?</p> <p>12      <b>A. Well, I'm -- in.</b></p> <p>13      Q. In other words, could you make more money if you quote  14       higher but there is an incentive to quote lower because  15       of reputational risk?</p> <p>16      <b>A. That may well be what he meant, yes. That's a fair  17       reading.</b></p> <p>18      Q. Others can deal with other points if they want to, but  19       I just want to reference the last thing, we need to  20       address, in the middle of this note:  21       "Need to address the stigma attached with quoting  22       high to remove pack mentality."</p> <p>23       When you met with those individuals from Citi does  24       that mean they were accepting that there was the  25       existence of low-balling?</p>	<p>1       accuracy?</p> <p>2       <b>A. I -- I cannot say for absolute certain because I don't  3       recall the conversations that we had on that particular  4       day.</b></p> <p>5       Q. Would you have taken your own notes of the meeting?</p> <p>6       <b>A. Probably not, because again this looks like this was  7       written by Peter Denton.</b></p> <p>8       Q. But Peter Denton and you would go to the meetings  9       together, you would never go singly on your own, I'm  10       assuming?</p> <p>11      <b>A. I might have done but typically we would try to go  12       together.</b></p> <p>13      Q. Yes. The very tail end of that document, please, just at  14       the bottom of that page:  15       "Do not feel a big reaction will help LIBOR.  16       "May be better to tighten up definition."  17       What's that a reference to?</p> <p>18      <b>A. Again, I think probably this harks back to there needs  19       to be guidance around submission instructions, what --  20       how you go about formulating a rate when there is no  21       cash market.</b></p> <p>22      Q. I just want to ask you one more question on this  23       document, over the page, please. The last bullet point:  24       "Arrange specific job roles for those who submit  25       rates."</p>
<p style="text-align: center;">Page 97</p>	<p style="text-align: center;">Page 99</p>

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<p>1 close to the lead-up for the publication of the      2 strengthening for the future document that the jury have      3 in their bundle. All right? This document.</p> <p>4 <b>A. Yes.</b></p> <p>5 Q. That was publicised and has gone into the jury's      6 documents.</p> <p>7 As we can see:</p> <p>8 "Apologies that this came late for the call with      9 Knight, but I finally got through to Mr Ewan.      10 "Readout from yesterday's meeting with banks is that      11 evolution rather than revolution is most likely for      12 LIBOR.      13 "BBA don't expect a root and branch review. Mr Ewan      14 said -- off the record -- he expects there would be      15 a clarification of definition plus some BBA education      16 road show.      17 "Also BBA would like panel banks to have to defend      18 submissions at their MM FX MC if they receive      19 complaints.      20 "Anything more than clarification would probably be      21 preceded by a wider consultation. (that was what      22 happened following the significant previous change in      23 definition in 1998)."      24 "Ewan is meeting LIFFE to discuss exchange traded      25 Sonia --"</p>	<p>1 A. I was unaware at the time that -- that that was a view      2 within the bank. I -- my recall is that by the time we      3 actually got to a position where we published it, the      4 bank were happy and supportive of the contents, but that      5 they wouldn't let us put their name on it. And the      6 reason for that being, as I think we've touched on      7 before, that they thought it was (a) a market issue, the      8 market rate, so that's for the market to fix it, and      9 that (b) if the bank had their name on it it would      10 somehow be an endorsement from the Bank of England and      11 that if we got one that everybody else would want one      12 too.</p> <p>13 Q. We know that this was published on 10 June 2008, this      14 document, strengthening LIBOR.      15 You know now, I suspect, but I want to clarify it      16 with you, that the Governor on 31 May 2008 described it      17 as being "wholly inadequate". Would you agree with      18 that?</p> <p>19 A. I have since seen that, yes.</p> <p>20 Q. And he was asking those within the bank, "What should we      21 do?" My question is: what did the bank encourage you to      22 do apart from taking themselves off of this document as      23 you've described?</p> <p>24 A. I can't remember exactly but I remember that the      25 document was drafted and redrafted many times right up</p>
<p style="text-align: center;">Page 101</p> <p>1 Should that be derivative?</p> <p>2 <b>A. Probably, yes.</b></p> <p>3 Q. "Same people we know from the MMLG", which is the money      4 markets, is that the liaison group?</p> <p>5 <b>A. That's correct.</b></p> <p>6 Q. The Bank of England group that you also occasionally sat      7 on?</p> <p>8 <b>A. Yes.</b></p> <p>9 Q. Thank you:      10 "Who are coming into the bank next week."      11 This reflects conversation -- did you have that with      12 Mr Tucker or did you have that with someone else? The      13 reason I ask is because the sender is redacted.</p> <p>14 <b>A. I don't think it's likely that it would have been      15 a conversation between me and Paul Tucker, I think it's      16 more likely it's somebody else and it's being sent by      17 that person to Mike Cross and Paul Tucker for their      18 information with some other people copied in.</b></p> <p>19 Q. The documents that the jury have looked at -- I am not      20 going to take you through those; okay? Because we can      21 clearly see what it says.</p> <p>22 <b>A. Okay.</b></p> <p>23 Q. Were you aware of the Bank of England's view that this      24 was inadequate in terms of its governance, in terms of      25 its rigour?</p>	<p style="text-align: center;">Page 103</p> <p>1 until the day of publication, and I also think that when      2 I saw the governor's comment, it might have been that he      3 had not quite grasped fully what the contents of the      4 document were but that's -- that's to one side.      5 But, you know, we were not being told by the people      6 that we were dealing with at the bank which, wasn't the      7 governor, and it wasn't Paul Tucker, but they were      8 saying that they were supportive of what we were trying      9 to do.</p> <p>10 Q. Well, that's what I was going to ask you. So, your      11 direct contacts with the individuals at the bank did not      12 disclose their internal view of your document to you?</p> <p>13 <b>A. That's correct.</b></p> <p>14 Q. Were you aware, for instance, of any disclosure of that      15 type -- I don't want to be rude to you -- but higher up      16 between Angela Knight and the bank?</p> <p>17 <b>A. Well, if it happened Angela didn't tell me.</b></p> <p>18 Q. That's fine, thank you very much.      19 Thank you.      20 We know that obviously this was a consultation; yes?</p> <p>21 <b>A. Yes.</b></p> <p>22 Q. 10 June. As I say, I'm not going to take you to it, but      23 I do want to take you to one of the responses to it.      24 It's not in my Lord's documents, I wonder if we can go      25 to the original documents and, firstly, page 1681 of the</p>

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<p>1 original documents. Just take a moment to put this on      2 your screen. It's not in front of you, Mr Ewan, I'm      3 afraid, it's not in the index.</p> <p>4 Whilst that is being found, if I can ask you these      5 initial questions: we've touched on the CME, who are      6 they?</p> <p>7 <b>A. Chicago Mercantile Exchange.</b></p> <p>8 Q. Do you have a memory of their response to this      9 consultation process? I mean, firstly, they responded.</p> <p>10 <b>A. Yes, they did.</b></p> <p>11 <b>I recall that they were keen that the calculation      12 moved to a median rather than an average.</b></p> <p>13 Q. Thank you.</p> <p>14 I just want to show you this head page, there's      15 nothing in it, but just to identify that that's where it      16 has come from and the date: 3 July 2008.</p> <p>17 This, as you can see:</p> <p>18 "Greetings John, BBA's recent consultation paper."      19 Is the beginning of their response to you; yes?</p> <p>20 <b>A. Yes.</b></p> <p>21 Q. I wonder if we can scroll down to 7B, which should be at      22 page 1687.</p> <p>23 You can see, as we scroll down, they gave      24 a significant response to the elements of the      25 consultation that you were asking questions about; yes?</p>	<p>1 <b>A. What you've described before as "credit tiering".</b>      2 Q. Credit tiering. Thank you.</p> <p>3 <b>A. Yes.</b>      4 Q. "Dispersion of this type might answer, at least in part,      5 the frequent accusation that contributor panelists      6 habitually submit false or biased responses to the daily      7 LIBOR survey. A contributor panelist who can borrow in      8 reasonable market size at any one of a wide range of      9 offered rates commits no falsehood if she bases her      10 response to the daily LIBOR survey upon the lowest of      11 these or the highest (or any other arbitrary selection      12 from nothing them)."</p> <p>13 Do you agree with that proposition?      14 (Pause)</p> <p>15 What they are saying is:      16 "In a reasonable market size a range of offered      17 rates, no falsehood, [it is in the female] she bases her      18 response to the daily LIBOR survey on the lowest of      19 these or the highest of these or any arbitrary selection      20 from among them."</p> <p>21 <b>A. That is fine as far as what Fred Stern is saying, which      22 is perfectly consistent with the definition.</b>      23 Q. Thank you.</p> <p>24 <b>A. That a bank -- if a bank gets shown money in reasonable      25 market size at a number of rates, you're not -- you're</b></p>
<p style="text-align: center;">Page 105</p> <p>1 <b>A. Yes.</b>      2 Q. Thank you.</p> <p>3 This 7B is talking about the impact of the current      4 diminished credit capacity of the market and it says:      5 "LIBOR users should have the clear understanding of      6 how the benchmark mechanisms functions in all market      7 conditions either placid or strained. This too deserves      8 emphasis in any educational or promotional effort on      9 behalf of LIBOR."</p> <p>10 I wanted to take you to the 7B(ii), which is in the      11 middle there:      12 "Worth adding is that, when seen from the vantage of      13 any individual contributor panelist, diminished market      14 credit capacity is likely to manifest itself in      15 unusually wide dispersion among the offered rates at      16 which the individual panelist might borrow in reasonable      17 size on any given day, at any given tenor. One would      18 expect to encounter dispersion of this type whenever      19 there is uncertainty and legitimate difference of      20 opinion about credit worthiness of any one market      21 participant among other market participants who must      22 choose whether or not to lend to it."</p> <p>23 They are there, aren't they, Mr Ewan, I suggest      24 describing the range that one would experience in      25 a market where there is diminished credit capacity?</p>	<p style="text-align: center;">Page 107</p> <p>1 <b>not outside of the definition if you say you're one the      2 lower ones or one of the higher ones. What I would      3 suggest is that it would be unusual for there to be      4 a notable dispersion between the highest and the lowest      5 rates at which a bank is offered money, and -- but there      6 is a final component to the definition which is a bank      7 can't submit a range, it has to submit one number --</b>      8 Q. Yes.      9      10 <b>-- every day. And so that's why the LIBOR question      11 isn't, "Where did you last borrow money?" So in order      12 to arrive at that one -- that one number, the question      13 is: where do you think you would be lent money? And      14 there can only be one answer to that and it should be      15 where you think an unnamed counterparty would offer you      16 money.</b>      17 Q. We don't disagree it has to be one figure that is      18 submitted --      19 <b>A. Mm-hm.</b>      20 Q. -- would you agree with the proposition that you funnel      21 down to that one figure?      22 <b>A. You should be using all of the information available to      23 you to get to that one figure, yes.</b>      24 Q. Which is the funnelling down process.      25 <b>A. I don't know that it's a funnelling down process.</b></p>

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<p>1     <b>It's -- but it's -- but yes, there should be a -- a --</b>      2     <b>a process at the bank that lays out how you arrive at</b>      3     <b>your number, whether it's a funnelling down or</b>      4     <b>an iteration or what evidence, however you want to</b>      5     <b>describe it, but there should be a process for doing it.</b></p> <p>6     Q. Yes.</p> <p>7     <b>A. Does that answer your question?</b></p> <p>8     Q. Thank you.</p> <p>9       I wonder if we can please look at JEX/083. We are      10 now at the tail end of September 2008, and the only      11 reason I want to show you this particular document, and      12 you are familiar with this, I think, Mr Ewan, was that      13 the United States Commodity Futures and Trading      14 Commission made contact with you, as you can see there,      15 as the director, and Angela Knight, concerning LIBOR.      16       Is that right?</p> <p>17     <b>A. Yes.</b></p> <p>18     Q. If we scroll down the page, please -- we don't need to      19 read all of this -- over the page, please. "Activity      20 under review", do you see the title there?</p> <p>21     <b>A. Yes.</b></p> <p>22     Q. "As my colleagues informed you, the CFTC currently is      23 conducting a review into whether banks who submit      24 borrowing rate information used in the calculation of      25 LIBOR for the US dollar panel may have under-reported</p>	<p>1     regulatory politics. The US Treasury wants to merge the      2     CFTC and the SEC.      3       The SEC being?</p> <p>4     <b>A. The Securities and Exchange Commission, another US</b>      5     <b>regulator.</b></p> <p>6     Q. Thank you:</p> <p>7       "CFTC is naturally not keen on this and so to      8 demonstrate its usefulness it has been very active and      9 expansionist of late and has been flexing its muscles      10 overseas. Notably imposing limits on speculative oil      11 trading in the Intercontinental Exchange in London, and      12 Dubai exchange, earlier this summer as oil prices      13 spiked.</p> <p>14       "(3) I strongly suspect that there is a tension      15 between the CFTC and FSA. The FSA is responsible for      16 overseeing the ICE".</p> <p>17       ICE being?</p> <p>18     <b>A. Intercontinental Exchange.</b></p> <p>19     Q. Thank you:</p> <p>20       "And did not want limits placed on speculative oil      21 trading as they were convinced, probably correctly, that      22 speculative trading in oil futures does not materially      23 affect the spot price. Nonetheless, the FSA agreed to      24 send daily information on trading to the CFTC and was      25 forced to issue statements repeatedly that they enjoyed</p>
<p style="text-align: center;">Page 109</p>	<p style="text-align: center;">Page 111</p>

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<p>1 development of LIBOR governors and whilst they are no  2 doubt a big beast with a fearsome name the beast seems  3 to be hibernating. I asked Habib."</p> <p>4 Is Habib Montani the partner at Clifford Chance you  5 were dealing with?</p> <p>6 <b>A. I believe so, yes.</b></p> <p>7 Q. "About this specific issue in July and following their  8 initial conference call and he promised to let me know  9 that whether the CFTC has the power in this area but I  10 have heard nothing. That said my usual lawyers don't  11 have transatlantic reach. We could ask the CME who they  12 use as they will be immediately up to speed.</p> <p>13 "Shall we get together to discuss our first moves  14 Monday morning?</p> <p>15 "Regards, John."</p> <p>16 She responds – if we scroll to the top of that  17 e-mail, please. This to you, from Sally:</p> <p>18 "I think we should not discuss this with anyone,  19 particularly CME, until we have a better understanding  20 of all the details from a regulatory lawyer. Also, we  21 should not ask CME about their lawyer. It should be  22 Clifford Chance because they have a better understanding  23 of LIBOR through the governance project. However,  24 advice on this particular subject needs to be the best,  25 paid for and from someone with specific experience of</p>	<p>1 <b>A. Correct.</b>  2 Q. Although, they weren't the regulator, in fact, of LIBOR?  3 <b>A. Because LIBOR wasn't regulated.</b>  4 Q. Yes. But regulator to regulator correspondence rather  5 than overseas regulator to you?  6 <b>A. Well, I think that was the suggestion that -- that the</b>  7 <b>CFTC would write to the FSA and the FSA would write to</b>  8 <b>the BBA.</b>  9 Q. Do you agree with that?  10 <b>A. Yes.</b>  11 Q. But the FSA, at that stage on your analysis, were not  12 interested in LIBOR?  13 <b>A. I think they were interested, but I don't think that</b>  14 <b>they were interested in regulating it.</b>  15 Q. They weren't interested, I am going to suggest, in  16 investigating it?  17 <b>A. Err -- I --</b>  18 MR CHAWLA: I don't think he can answer that.  19 Q. All right.  20 Can we now go, please, to JEX/089.  21 If you would just allow me a moment. Is that  22 JEX/089? Can you scroll down that page, please? It's  23 the wrong reference. Just allow me a moment.  24 I wonder if you could put up on the screen 1244 from  25 the original documentation. Thank you.</p>
<p style="text-align: center;">Page 113</p> <p>1 the US.  2 "Perhaps it would be worth Alex giving Habib a call.  3 If Habib thinks this would be a conflict for them, given  4 their other work, then Freshfields or Allen &amp; Overy may  5 be better.  6 "I would be happy to call Tom Horotis(?) in Angela's  7 absence if you would like me to. Sally."  8 If we go further up, the chain continues to you from  9 Angela:  10 "All, I have just picked up the exchange of e-mails.  11 I agree with Sally, we use our lawyers, consult them  12 first before anything else and use Clifford Chance."  13 When the CFTC first arrived you clearly questioned  14 their jurisdiction to look at this particular matter.  15 Would you agree?  16 <b>A. Yes.</b>  17 Q. And at that stage, as you've indicated, you wanted the  18 inquiry, which in fact then happened, to be processed  19 through the Financial Services Authority, the UK  20 regulator at that stage?  21 <b>A. Well actually, that suggestion didn't come from me.</b>  22 <b>I think that was Angela.</b>  23 Q. But the BBA stance, let's put it that way.  24 <b>A. Credit.</b>  25 Q. Through the UK regulator.</p>	<p style="text-align: center;">Page 115</p> <p>1 Just look at the head page, I am not going to ask  2 you all of the detail about this, Mr Ewan, because it's  3 quite a long transcript. We are now in October 2008.  4 This is a further conversation between you and  5 Mr Storey; all right?  6 <b>A. Yes.</b>  7 Q. Do you agree with that?  8 <b>A. Yes.</b>  9 Q. I wonder if we can turn, please, to internal page 8  10 within that document.  11 Now, this a conversation that we can see starting  12 there. Mr Storey is talking to you at the top about  13 LIBOR; all right? And it reflects, as we can see, the  14 reoccurring theme, so he said:  15 "Yeah, fine. LIBOR, whether the LIBOR is 4 per  16 cent, 5 per cent or 6 per cent it's fundamental point is  17 people aren't lending money in term."  18 Just pausing there, he's saying there's still not  19 liquidity in the market in 2008.  20 <b>A. Correct.</b>  21 Q. We agree.  22 (Transcript read)  23 I have shown you that transcript for two reasons.  24 How did you move the rate with WestLB, Mr Ewan?  25 <b>A. Okay, that's -- I think that's a reference -- and</b></p>

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<p>1    I wouldn't swear to this -- but I believe that's      2    a reference to -- there was some question around      3    WestLB's rates, and I can't remember where it came from,      4    when it was one of the committee members or a market      5    comment or -- or whatever. But I recall, with the aid      6    of this note, that on one occasion I spoke to WestLB and      7    asked them about the accuracy of their rates, and then      8    the next day their rates moved.</p> <p>9    Q. Do you agree he, perhaps in jest -- but I want to ask      10   you about that -- postulates again the theory of putting      11   people together to move the rate?</p> <p>12   A. Yes, and I think that that is very clearly a thought      13   exercise. And there are references throughout that to      14   it being fibbing, and there's an inference that it would      15   be unprincipled. And I think it's quite clear that      16   neither Miles nor I would ever suggest that the banks      17   should get together and just agree in a room to just      18   change the rates.</p> <p>19   Q. I think he uses the word "can't discount the      20   possibility" at one stage, and that's why I put it in      21   the way I did. Is that a jest or is that serious?</p> <p>22   A. It was not serious.</p> <p>23   Q. Let's move on.</p> <p>24   I want to look at JEX091. We are still      25   in October 2008. Now, this is from Mr Koutsogiannis at</p>	<p>1    changes. If I can summarise it, it's a very long      2    document that sends your document back with UBS's track      3    changes in it. Do you agree with that as a summary?</p> <p>4    A. Yes.</p> <p>5    Q. I want to just focus on this particular part of the      6    document which is paragraph 2 -- firstly your      7    paragraph 2 in black:</p> <p>8         "The rate at which each contributor submits must be      9         formed from that bank's perception of its cost of funds      10        in the interbank market, and not set in reference to      11        information supplied by any individual or institution      12        outside that area of the contributing bank that has the      13        primary responsibility for managing that bank's cash."</p> <p>14        Namely, cash rate. Do we agree?</p> <p>15   A. Yes. Yes, yes.</p> <p>16   Q. UBS's response in the purple, which are track changes:      17        "As previously indicated to the BBA, UBS has      18        particular concerns as to the formulation of the second      19        half of this sentence. We would propose that the BBA      20        replaces the current formulation of clause 2 of the      21        terms of reference with the following:</p> <p>22         "The rate at which each contributor submits must be      23         formed from that bank's perception of its cost of funds      24         in the interbank market. The area of the contributing      25         bank that has the primary responsibility for managing</p>
<p style="text-align: center;">Page 117</p>	<p style="text-align: center;">Page 119</p>

<p>1    UBS to you, yes?</p> <p>2    A. Yes.</p> <p>3    Q. This is now October 2008, and it is in response to      4    a separate paper called the "BBA LIBOR scrutiny", yes?</p> <p>5    A. Yes.</p> <p>6    Q. This is UBS's questions and points raised, as the title      7    suggests. And it says:</p> <p>8         "John, after discussing some points with my internal      9         legal and compliance, please find attached some      10        responses that we would like both yourselves at the BBA,      11        the committee and Clifford Chance to opine on.</p> <p>12         "Please pay special attention to the comments in the      13        appendix as this is a reoccurring theme and something      14        that we have highlighted before that we feel is still      15        left unresolved.</p> <p>16         "If anything is unclear please let me know and we      17        can discuss at the meeting tomorrow.</p> <p>18         "Kind regards, Pete."</p> <p>19         Sorry, Mr Ewan, I didn't appreciate you did not have      20        it. Do you have it in front of you?</p> <p>21   A. I have it here.</p> <p>22   Q. Thank you very much.</p> <p>23         I wonder if we can turn, please, within that      24        document electronically to page 19 of it. This is part      25        of the attachment, Mr Ewan. There are lots of track</p>	<p>1    that bank's cash will be solely responsible for the      2    calculation and accuracy of the rate [yours]."</p> <p>3    Their response:</p> <p>4         "We believe that there is a fundamental conceptual      5        difficulty with the proposed current wording of clause 2      6        provided by the BBA. We believe that all banks accept      7        that accountability for the submitted rates should rest      8        solely with the cash trading desks. However, the cash      9        trading desks do not work in a vacuum and their      10       'perception' of the rate at which the bank can borrow at      11       any given time is bound to be directly" --</p> <p>12   A. "Indirectly". Forgive me.</p> <p>13   Q. I apologise:</p> <p>14         "... indirectly influenced by the 'information' that      15        they receive during the ordinary course of their working      16        days from a variety of sources. This information may be      17        sourced from the media or through their interaction with      18        other parts of the bank or the market in the proper      19        discharge of their many daily functions as a busy cash      20        trading desk. We therefore consider that the current      21        proposed wording of the BBA does not accurately reflect      22        the reality of the situation and that, as a practical      23        matter, it would be impossible for the cash desk to      24        analyse the source of all the information on which its      25        good faith exception of the bank's cost of borrowing</p>
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<p>1 cash is based. We hope that the proposed reformulation      2 above, however, does not (sic) capture the concept that      3 the BBA are asking the contributor banks to agree to,      4 i.e. that the cash desk takes full responsibility for      5 the submitted rate, and that this should not be      6 contributed or in any way influenced by other areas of the      7 bank or outside institutions. UBS considers that many      8 current contributor banks may have problems signing the      9 terms of reference in their current formulation if      10 clause 2 remains unchanged."</p> <p>11 Now, I have taken you to this, Mr Ewan, for two      12 reasons -- three reasons, in fact -- you have indicated      13 just a little while ago that you got them to sign up      14 because it was the cash desk. Do you remember? And      15 I said, well, it wasn't quite right.</p> <p>16 <b>A. Yes, we touched on that.</b></p> <p>17 Q. The proposed amendments, which are that the bank's cash      18 will be solely responsible for the calculation, and the      19 formulation that was given by UBS, was the formulation      20 that was adopted by the FXMMC. Do you remember that?</p> <p>21 <b>A. I -- I was trying to remember which one was finally used      22 and I couldn't. But, I mean, I will accept if you tell      23 me that that's the one that was -- that was adopted,      24 I'll -- I'll quite happily accept that.</b></p> <p>25 Q. So the broad points I just want to establish with you is</p>	<p>1 Q. The fact that the definition was on the website.      2 Therefore it's suggested that everyone understood what      3 the definition stood for. Yes?</p> <p>4 <b>A. Yes.</b></p> <p>5 Q. This is from Paul Fisher, who is at the Bank of England.      6 What responsibility did Mr Fisher have? Do you know?</p> <p>7 <b>A. I believe at the time he was a -- a director of the      8 bank's money market division. I think he was also, at      9 that point, the chair of one of the bank committees that      10 the BBA attended.</b></p> <p>11 Q. He was quite high in the bank?</p> <p>12 <b>A. Yes.</b></p> <p>13 Q. "John [this is to you only], LIBOR definitions. This is      14 a personal email rather than an official bank line      15 following a difficult evening.</p> <p>16 "The definition of LIBOR in your consultation      17 paper..."</p> <p>18 Just pausing there, there was a further consultation      19 at this stage, is that right? Clearly.</p> <p>20 <b>A. Yes.</b></p> <p>21 Q. "Is the rate at which the individual contributor bank      22 could borrow funds, were it to do so, by asking for and      23 then accepting interbank offers in a reasonable market      24 size just prior to eleven o'clock London time.</p> <p>25 "I have to say it took me a long time to find that</p>
<p>Page 121</p> <p>1 that UBS were saying it is not just simply the      2 information within the cash desk itself that lends to      3 the information of the fixing of a LIBOR. "And we      4 can't," they were saying, sign up to the documentation      5 that the BBA were then requiring to say it was the case      6 that that's all they sourced before they submitted their      7 LIBORs.</p> <p>8 Do you agree?</p> <p>9 <b>A. I -- I'm sorry, I didn't realise there was a question      10 there.</b></p> <p>11 Q. They have set out, haven't they, precisely the very      12 things that you've described a submitter would do,      13 market colour, access to information, and so on and so      14 forth?</p> <p>15 <b>A. Yes, and I -- yes.</b></p> <p>16 Q. Moving on to a slightly different topic. If we can      17 look, please, at JEX/093. I have almost finished the      18 documents, Mr Ewan.</p> <p>19 Now, I am not sure that is the right reference. Can      20 you scroll down, please? (Pause). Thank you. Yes,      21 thank you very much. I just wanted to touch on this.</p> <p>22 This is in November 2008, and you have talked about      23 the way the BBA promulgates the definition, the      24 understanding of the definition within the market. Yes?</p> <p>25 <b>A. Yes.</b></p>	<p>Page 123</p> <p>1 on your website (I only found it within a consultation      2 paper), and when I looked under the tab for 'definition'      3 what it actually says is:</p> <p>4 "BBA LIBOR is the BBA fixing of the London interbank      5 offered rate. It was based on offered interbank deposit      6 rates, and contributed in accordance with the      7 instructions to BBA LIBOR contributor banks.</p> <p>8 "Which is ambiguous, to say the least. And when I      9 looked to Wikipedia [it gives a reference], it gives a      10 daily reference rate based on the interest rates at      11 which offered to lend unsecured loan funds to other      12 banks, which seemed clearer but entirely wrong in      13 current conditions.</p> <p>14 "All of this was sparked by reading some Goldmans      15 research..."</p> <p>16 "Goldmans" being a reference, I would suggest, to      17 Goldman Sachs, the investment bank?</p> <p>18 <b>A. Correct.</b></p> <p>19 Q. "...which assumed that LIBOR was the rate at which banks      20 would lend, not the rate at which they could borrow.</p> <p>21 "If Goldmans can get it wrong maybe there's      22 a complete lack of public understanding? If so, I would      23 start by putting the official definition in pride of      24 place on the BBA website, and then get someone's son or      25 daughter to edit the Wikipedia."</p>

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<p>1 It was clear, therefore, even at that stage, to a  2 senior member of the Bank of England, that there wasn't  3 the clarity in the publication of the rate from the BBA  4 on its website. Do you agree?</p> <p>5 A. Erm --</p> <p>6 Q. This is in November 2008.</p> <p>7 A. I -- I think it's surprising. I would have had no  8 hesitation in saying it would be easy to find the  9 definition. I mean the LIBOR website went through  10 a number of changes. It's possible that there was  11 a dropped or broken link. I do recall this because  12 I remember, after getting this, I distinctly remember  13 going and setting myself up a Wikipedia account  14 specifically so I could edit what Wikipedia said about  15 the LIBOR rate.</p> <p>16 Q. The point is, Mr Ewan, it -- and forgive me for  17 suggesting -- but the clarity of the definition from the  18 public perception of the BBA on its website is not as  19 clear as evidenced by that e-mail as it is suggested it  20 was. Put it that way. You either agree or disagree.</p> <p>21 A. I'd quite like to, actually, if it would be possible, go  22 back and look at the 2008 website, because I would  23 have -- I did not think it was hard to find. And  24 considering that we'd spent the previous six months  25 engaged in consultation with the market and talking to</p>	<p>1 in LIBOR. In their view the interest stems more from  2 posturing for the domestic market ... (Reading to the  3 words)... standing in the anticipated US regulatory  4 shakeout than any real worries about LIBOR. The FSA  5 also think that the CFTC claim to have any oversight of  6 LIBOR may be rather tenuous. I also discovered that the  7 FSA sees no reason for a parallel investigation for  8 a number of reasons. Firstly, in their view, we do not  9 fall within their ambit. And, secondly, the market  10 tells them that LIBOR is not broken."</p> <p>11 Hence why I suggested, Mr Ewan, that the FSA at that  12 time were not interested in an investigation of LIBOR.</p> <p>13 A. Okay. Well, that is a report from Sally Scutt of  14 something that she says was said to her by the FSA.</p> <p>15 Q. I would like now, please, to look at JEX/096. I just  16 need to touch on this. This is a transcript of the  17 conversation on 21 May 2009. I would like to, within  18 that document, please go to page 3 of it. It starts at  19 the top:</p> <p>20 "Very specifically, I mean again you know I've  21 actually spoken to RBC just recently because I went  22 round and had a relationship visit with them quite  23 recently. Their view is of a very very tight definition  24 of LIBOR which is not where somebody has recently  25 offered you cash, it's where you can stand up at 11 am</p>
<p>Page 125</p> <p>1 journalists and putting out papers, I -- I don't know  2 what more we could have done.</p> <p>3 Q. I hope your Lordship and the jury will forgive me,  4 I have two more documents that I would just like to deal  5 with and then I'm finished. Three more points in those  6 documents. Can we look, please, at JEX/095.</p> <p>7 This returns to the issue -- I am only doing it  8 chronologically, Mr Ewan -- but I want to look at  9 paragraph 2. It turns to the issue of the then ongoing  10 CFTC investigation.</p> <p>11 "I saw David Bailey...."</p> <p>12 This is an e-mail from Sally Scutt to you:</p> <p>13 "I saw David Bailey (capital markets sector leader)  14 and Douglas Hull at the FSA yesterday. We also think  15 that the governance and scrutiny paper was very good."</p> <p>16 That is a reference to the later papers that we've  17 just -- we've just talked about. Yes?</p> <p>18 A. Yes, okay.</p> <p>19 Q. "Predictably they asked us to remove an explicit  20 reference to the FSA, which I have done."</p> <p>21 Same issue again, papers coming out, FSA not wanting  22 to be publicly associated with it?</p> <p>23 A. Yes.</p> <p>24 Q. Thank you.</p> <p>25 "They raised the issue of the US regulatory interest</p>	<p>Page 127</p> <p>1 in London and say, 'Go on then, fill me', and you would  2 get right then."</p> <p>3 Mr Thursfield says:</p> <p>4 "Okay, so it's an interpretation difference  5 primarily then."</p> <p>6 "That's exactly what it is. In fact, we need to  7 have a discussion of that at the Foreign Exchange and  8 Money Markets committee."</p> <p>9 "Okey-dokey."</p> <p>10 "My view is, because I'm not going to be there, but  11 my view is that you -- I don't know our interpretation  12 would be we also take into account where we are given  13 and imply an offer from that."</p> <p>14 "Mm."</p> <p>15 "As well, where we could actually, we definitely  16 don't rely on where if we called a broker we would  17 definitely get an offer at that particular time. But  18 it's where we imply an offer would be forthcoming."</p> <p>19 "Sure."</p> <p>20 "Have a reasonable expectation, so long as we are  21 reasonably patient enough. Obviously you want the money  22 in huge amount there and then, you'll have to pay a bit  23 more [for it]."</p> <p>24 "But I don't think that's really the common view on  25 where it is. I mean, there have been large amounts of</p>

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<p>1 primary CD issuance particularly."</p> <p>2 "Probably more so than cash deposits and going to</p> <p>3 bank counterparties at significant sub-LIBOR levels.</p> <p>4 That would be my view, and that's obviously behind the</p> <p>5 push lower overall."</p> <p>6 The transcript finishes a page over.</p> <p>7 My question is this. There was a difference between</p> <p>8 the panel bank's interpretation of the definition.</p> <p>9 <b>A. It is a very fine point. But, yes, there is.</b></p> <p>10 Q. And despite the definition's simplicity and the way it</p> <p>11 is phrased, it was clear, even for Mr Thursfield, who</p> <p>12 was -- this is in 2009 -- a long-standing member of the</p> <p>13 FXMMC, a different approach to the question compared to</p> <p>14 that which you have touched on from RBC?</p> <p>15 <b>A. Yes.</b></p> <p>16 Q. One moment.</p> <p>17 The last document I would like to put to you,</p> <p>18 please, is JEX/099.</p> <p>19 I only want to put this to you, Mr Ewan because you</p> <p>20 are part of the BBA, okay? I think we've clarified</p> <p>21 whose hand this document is in and I am going to look at</p> <p>22 my learned friends who are not going to tell me.</p> <p>23 Mr Kearney's hand. Thank you. Mr Kearney's hand.</p> <p>24 I just want to establish that this would have been</p> <p>25 one of the meetings that the BBA had on 25 February as</p>	<p>1 UBS that you were aware of anyway?</p> <p>2 <b>A. I certainly had -- I do not recall ever seeing that</b></p> <p>3 <b>reported or said to me anywhere other than the record of</b></p> <p>4 <b>this conversation here.</b></p> <p>5 Q. Do you have a memory of this meeting?</p> <p>6 <b>A. I don't.</b></p> <p>7 MR HAWES: Would your Lordship just allow me one moment</p> <p>8 (Pause) I have concluded what I have at the moment to</p> <p>9 cross-examine Mr Ewan about, but there may be an issue</p> <p>10 of disclosure that I need to resolve overnight with my</p> <p>11 learned friend. I anticipate there may be some</p> <p>12 re-examination in any event.</p> <p>13 MR CHAWLA: Yes, but about 20 minutes or so. I am in</p> <p>14 my Lord's hands.</p> <p>15 MR JUSTICE COOKE: You don't wish to do that tonight then?</p> <p>16 MR HAWES: I'm afraid not. I am sorry to Mr Ewan, I tried</p> <p>17 to get him done today. But on that basis, if Mr Ewan</p> <p>18 unfortunately has to come back tomorrow, would</p> <p>19 your Lordship just allow me to formally leave it open on</p> <p>20 that one issue that I need to discuss with my learned</p> <p>21 friend?</p> <p>22 MR JUSTICE COOKE: Yes.</p> <p>23 MR HAWES: Other than that, that would be the only matter.</p> <p>24 Thank you.</p> <p>25 MR JUSTICE COOKE: Yes. All right, members of the jury,</p>
<p style="text-align: center;">Page 129</p>	<p style="text-align: center;">Page 131</p>

<p>1 it's dated in 2010.</p> <p>2 Would you have been at that meeting with UBS?</p> <p>3 <b>A. Yes.</b></p> <p>4 Q. It touches on, as we can see, at the second number 1 in</p> <p>5 the chapter in the gutter:</p> <p>6 "The SEC got in touch with UBS asking for large</p> <p>7 amounts of data. Follow on from CFTC request last year.</p> <p>8 SEC asked UBS why they weren't helpful with CFTC. UBS</p> <p>9 asked the SEC to contact LIBOR native regulator. Reply</p> <p>10 was that UBS were being obstructive."</p> <p>11 Do you remember this conversation?</p> <p>12 <b>A. I -- I don't.</b></p> <p>13 Q. But I reflects, does it, the stance that the BBA had</p> <p>14 taken in this country, which was information through the</p> <p>15 FSA, FCA?</p> <p>16 <b>A. Well, the BBA did take the view that the appropriate way</b></p> <p>17 <b>for that request to come was via the UK regulator,</b></p> <p>18 <b>whether or not the UK regulator actually regulated</b></p> <p>19 <b>LIBOR.</b></p> <p>20 Q. UBS have -- it's recorded here under the arrow that we</p> <p>21 see just on that left-hand side -- UBS suggest that the</p> <p>22 SEC want to create bigger index and affiliate and want</p> <p>23 to discredit LIBOR before releasing the index to the</p> <p>24 market.</p> <p>25 Was there any credible basis for that suggestion by</p>	<p>1 thank you very much. Ten o'clock tomorrow morning,</p> <p>2 please.</p> <p>3 (In the absence of the jury)</p> <p>4 MR HAWES: Can I just detain your Lordship one moment in the</p> <p>5 absence, obviously, of Mr Ewan. He can be released,</p> <p>6 subject to your Lordship.</p> <p>7 MR JUSTICE COOKE: Yes. Would you mind leaving, Mr Ewan?</p> <p>8 Ten o'clock tomorrow, please. Not for long, it is</p> <p>9 hoped.</p> <p>10 THE WITNESS: It is hoped.</p> <p>11 (The witness withdrew)</p> <p>12 Housekeeping</p> <p>13 MR HAWES: I just wanted to detain your Lordship because</p> <p>14 obviously, in the course of my cross-examination, the</p> <p>15 board meeting in 2008, we understand there is a note in</p> <p>16 Mr Ewan's -- we don't have it -- but we understand there</p> <p>17 is a note in Mr Ewan's hand of that meeting. I think at</p> <p>18 the moment the Crown's view is it is not disclosable.</p> <p>19 I want to just review precisely what he said about</p> <p>20 whether a note was taken or not, so I don't want to</p> <p>21 argue the point now. I wanted your Lordship to</p> <p>22 understand that was the issue, because if there is</p> <p>23 a hand note, subject to a review of what he said about</p> <p>24 it, it may well be that I would ask your Lordship, if</p> <p>25 the Crown are not prepared to disclose it, to at least</p>
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<p>1        look at it.</p> <p>2        That was the issue.</p> <p>3        MR JUSTICE COOKE: Right. And working on the assumption</p> <p>4        that Mr Ewan will be through in, say, half an hour,</p> <p>5        where else do we go tomorrow then?</p> <p>6        MS JONES: My Lord, we then return to, I'm afraid, a bit of</p> <p>7        reading and we start with the admissions, which I think</p> <p>8        will take a couple of hours to go through because it's</p> <p>9        moving through some of the documents.</p> <p>10      MR JUSTICE COOKE: That is what was down for this afternoon</p> <p>11      so to speak.</p> <p>12      MS JONES: That's right. We'll pick back up with the</p> <p>13      graphics and start dealing with the communications. So,</p> <p>14      in effect, on my calculation, we are about half a day</p> <p>15      out.</p> <p>16      MR JUSTICE COOKE: Yes. Yes, very good. Thank you.</p> <p>17      (4.45 pm)</p> <p>18                  (The court adjourned until</p> <p>19                           Wednesday, 10 June 2015 at 10.00 am)</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	
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<p>1        I N D E X</p> <p>2</p> <p>3        MR EWAN (continued) ..... 1</p> <p>4        Cross-examination by MR HAWES (continued) ..... 1</p> <p>5        Housekeeping ..... 132</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	
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<p>1 in mind that they're contributing to the full suite of 2 the rates: 3 "Expressed complete satisfaction with BBA LIBOR rate 4 setting." 5 So that's two consultees. 6 Over the page, BNP Paribas, the top line: 7 "Praised BBA LIBOR as an accurate, reliable fixing 8 without any major problems to convey. 9 "Mentioned how tightly tied ..." should that be?</p> <p>10 <b>A. Yes, I assume so.</b></p> <p>11 Q. "... BBA LIBOR is to the actual market." 12 There's a reference to extending it to the 13 South African rand. 14 Societe Generale who contributed to three: 15 "No major problems raised with BBA LIBOR as a rate 16 fixing. Noticed an improvement in LIBOR in terms of 17 real market accuracy and representation." 18 I should have said Yen LIBOR. We can see it's 19 francs, euros and Japanese yen LIBOR for SocGen. 20 Over the page, and we'll just see if we can get an 21 overall impression of what you were being told in the 22 early summer of 2007. Sumitomo, they contribute, 23 amongst others, to Yen LIBOR: 24 "Find Japanese yen very flat. Only really utilise 25 it for funding purposes. It tends to rise 25 basis</p>	<p>1 with different people at [REDACTED] Securities. They're both 2 about slightly different points. The first is: 3 "Dominated by areas and avenues of growth." 4 The second is about, towards the bottom of the page, 5 in relation to Turkish rates and the observation being 6 made: 7 "From experience in the Turkish markets a need was 8 identified for a reliable and trusted fixing that is 9 beyond repute."</p> <p>10 <b>A. Yes.</b></p> <p>11 Q. Was that your view as well, that it needed to be 12 reliable and trusted and beyond repute?</p> <p>13 <b>A. Sorry, that's a specific question about a fixing for Turkish markets.</b></p> <p>14 Q. In terms of LIBOR generally, so far as you were 15 concerned? I appreciate this is specifically about 16 Turkish markets.</p> <p>17 <b>A. Yes, I think the entire of the financial markets wanted accurate rates.</b></p> <p>18 Q. Very well. Over the page, please. Bank of 19 Tokyo-Mitsubishi, BOTM. We know that they contribute, 20 amongst others, to Japanese yen: 21 "Very happy with BBA LIBOR in general in terms of 22 the product and the processes behind it. Acknowledge 23 a general trend of improvement in terms of reliability</p>
<p>Page 5</p> <p>1 points every five years then remain flat." 2 Then two bullet points down from there: 3 "BBA LIBOR isn't fully representative of the market 4 and on average tends to be too high. This may be 5 because once upon a time it was cash dollar rated..." 6 Then it goes on from there; yes?</p> <p>7 <b>A. Yes.</b></p> <p>8 Q. At the bottom of the page, Commonwealth Bank of 9 Australia. We can deal with this very shortly: 10 "Very happy with BBA LIBOR in general in terms to 11 the product and the processes behind it." 12 They are dealing with Australian and New Zealand 13 dollars. 14 Over the page, West LB who contribute to five 15 currencies, including the yen: 16 "Very happy with BBA LIBOR in general in terms of 17 the product and the processes behind it. Also very 18 happy to contribute their contributions to BBA LIBOR." 19 So we'll look at the others in just a moment, but 20 was this a general theme in April of 2007 or shall we 21 look at all of them just to check?</p> <p>22 <b>A. Well, no, I think that's fair. I mean, in 2005 and '06 and '07 there was actually competition amongst banks who wanted to be a contributor to BBA LIBOR.</b></p> <p>23 Q. Over the page, please. [REDACTED] You have two meetings</p>	<p>1 and accuracy." 2 He gives more detail further down. 3 Mizuho, again we know that they contribute to yen, 4 although it's not set out there: 5 "Very happy with BBA LIBOR in general in terms of 6 the product, the processes behind it. Are eager to 7 become contributors in the existing currencies and they 8 feel that they have significantly increased their volume 9 of deals in the last year." 10 Just to finish this off quite quickly. We see over 11 the page, at the next page, Citigroup, similar 12 sentiments. HSBC, similar sentiments from Mr Wood: 13 "Happy that all contributors seem to be behaving 14 themselves in terms of not quoting excessively high or 15 low." 16 Abbey: 17 "Happy with the fixing process and its fixings 18 broadly speaking. Occasionally a group of banks seem to 19 simultaneously quote higher than the actual market 20 resulting in an excessively high LIBOR which doesn't 21 accurately represent the market." 22 That's a little qualification there to the general sentiment. 23 Over the page, Barclays, Miles Storey: 24 "Happy with the process. Looking from a position</p>

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<p>1 with vast experience it's currently at peak performance.      2 Although it isn't perfect, it's probably running as near      3 as to perfect as it will reach. Rumblings from other      4 banks regarding Barclays manipulation of the rates seems      5 to have now subsided. Mentioned it would not be      6 feasible for Barclays to be involved in a conspiracy      7 with the number of other banks that would be required in      8 order to manipulate the rates for the currencies that      9 have 16 contributors."</p> <p>10 So, again, a theme with a qualification.      11 We have four more banks here. Over the page,      12 Credit Suisse:      13 "BBA LIBOR is currently the best it's ever been in      14 terms of process, efficiency and accuracy."      15 Over the page, JP Morgan Chase:      16 "BBA LIBOR seems to be running smoothly without any      17 signs of manipulation."      18 Over the page, Lloyds TSB, Clive Jones:      19 "BBA LIBOR is running to satisfaction with a lower      20 level of complaints and rumblings than there previously      21 was."      22 Finally, in relation to this, Royal Bank of      23 Scotland:      24 "In terms of the dollar market all participants are      25 comfortable with the levels and know what to expect."</p>	<p>1 now to December 2007, 7 December, and this is your      2 e-mail -- we can see in fact it has your name over the      3 page -- to a whole host of people. They include the      4 FXMMC, do they, as members?      5 <b>A. That's a wider group than the Foreign Exchange and Money</b>      6 <b>Markets Committee. That looks like -- that looks like</b>      7 <b>it's at least one representative from every bank that</b>      8 <b>contributes to any one of the individual currency</b>      9 <b>calculations.</b></p> <p>10 Q. So the subject is, "Invitation from Angela Knight to      11 a discussion of BBA LIBOR":      12 "Dear BBA LIBOR contributor      13 "As you know, accurate BBA LIBOR fixings are central      14 to the ongoing health of the markets and so at this time      15 of heightened stress and scrutiny more than ever it is      16 vital that the BBA LIBOR rate setting possess is seen to      17 be transparent and robust."      18 Pausing there. Was that your view at the time?      19 <b>A. Yes. I mean, it is my view throughout the entire</b>      20 <b>relevant period that the process must be transparent and</b>      21 <b>robust.</b></p> <p>22 Q. It goes on:      23 "There has been increasingly prominent comment in      24 the market and the media on the rates and so we would      25 like to invite you to a meeting chaired by our</p>
<p style="text-align: center;">Page 9</p> <p>1 Then there are further bullet points set out.      2 Was that the general market sentiment that you      3 gleaned at that time in April, May and June of 2007?      4 <b>A. Yes. Sorry, I don't know whether it's material or not,</b>      5 <b>but just I notice on internal page 10 of that, talking</b>      6 <b>about JP Morgan Chase --</b>      7 Q. So this is if you go back, please, two pages.      8 <b>A. That's the one. I think there's a typo there. That</b>      9 <b>should read at the top David, not Davis Lally.</b>      10 Q. Very well. Thank you.      11 Once they were compiled, where did these reports go?      12 <b>A. They were seen internally at the BBA and they were seen</b>      13 <b>by the Foreign Exchange and Money Markets Committee.</b>      14 Q. The point of showing them to the Foreign Exchange and      15 Money Markets Committee?      16 <b>A. Because they are the people who are ultimately</b>      17 <b>responsible for overseeing the rate and if there is</b>      18 <b>dissatisfaction with the rate or that users feel that it</b>      19 <b>needs to be improved or altered, they know.</b>      20 Q. Very well. Then we know that conditions became      21 significantly more difficult in the autumn of 2007.      22 <b>A. Yes.</b>      23 Q. We see, please, a consequence of that at JEX/034. In      24 your bundle there, Mr Ewan, page 149. On JEX/034 can we      25 go on to page 4 of 6. That's it. So we have moved on</p>	<p style="text-align: center;">Page 11</p> <p>1 Chief Executive, Angela Knight, to discuss openly the      2 integrity of the fixings and how to ensure their      3 accuracy in the future."      4 There are then proposed dates. How usual was this      5 sort of meeting?      6 <b>A. To my knowledge -- well, there hadn't been such</b>      7 <b>a meeting, I don't think, between me joining the BBA and</b>      8 <b>this occasion. This was the first time that I think the</b>      9 <b>Chief Executive of the BBA had invited all the LIBOR</b>      10 <b>contributing banks in to discuss the rate setting</b>      11 <b>process, but, as we have touched on over the last few</b>      12 <b>days, there are throughout late 2007 and 2008, and</b>      13 <b>I think later as well, there are an increasing number of</b>      14 <b>ad hoc meetings, as well as I think we increased the</b>      15 <b>frequency of the scheduled committee meetings to</b>      16 <b>precisely address this point.</b>      17 Q. When you say "address this point", what do you mean?      18 <b>A. Ensuring that the BBA LIBOR rate setting process is</b>      19 <b>transparent and robust.</b>      20 Q. Involving the Chief Executive of the BBA, what was the      21 purpose of that?      22 <b>A. Well, Angela Knight is a -- she's a very sort of hands</b>      23 <b>on individual and she -- whilst she is responsible for</b>      24 <b>the totality of what the BBA did, whilst everything was</b>      25 <b>running smoothly and she was in general content for</b></p>

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<p>1 LIBOR to be run by her junior staff that were more --      2 that were responsible for it day to day, this is      3 a reflection of the fact that she realises that LIBOR is      4 important and the importance of LIBOR, as I say,      5 I think, in the times of heightened stress, it becomes      6 more important than ever that we can set accurate rates      7 for the market and so it is a matter of personal concern      8 to her.</p> <p>9 Q. Thank you. Then we go on, please, to April 2008. You      10 were taken to a fair amount of detail about that      11 yesterday, but can we just look at one or two other      12 issues that arose at that time within the context of      13 what was happening then. Can we turn, please, to      14 JEX/046. In your bundle, page 180. We looked at      15 a number of documents around this time but not      16 specifically this one yesterday.</p> <p>17 Now, this is from Daniel Knight of Bank of America.      18 Can you remember who he was?</p> <p>19 A. I think Dan Knight was the contributor at Bank of      20 America and I believe -- I think he was also the FX and      21 Money Markets representative from Bank of America.</p> <p>22 Q. You say "contributor", was that in dollars?</p> <p>23 A. Yes.</p> <p>24 Q. US dollars. He says this:      25 "John, I've started receiving an increasing</p>	<p>1 So there you had someone and would you describe them      2 as a prime bank at the time?</p> <p>3 A. Well, as we -- I don't think we have touched on this      4 precise point, but the BBA never used the term "prime      5 bank" because we -- the Foreign Exchange and Money      6 Markets Committee didn't think that they could      7 accurately describe that, but --</p> <p>8 Q. Don't worry because that's then therefore a loose      9 question of mine, but they were a contributor bank      10 certainly?</p> <p>11 A. Yes, and, as we have touched on, the way that the panel      12 review process is conducted is that it seeks to find the      13 largest, most active, strongest banks.</p> <p>14 Q. You respond to that:      15 "I'm not surprised to hear this. I think you're      16 right that talking to the panel banks won't achieve      17 much. However, in confidence there's a meeting of the      18 BBA board next week which consists of CEOs and Chairman      19 of the majors banks and we will discuss this. In my      20 view this could be reputational issue for the banks, as      21 well as the fixings."</p> <p>22 A. Yes.</p> <p>23 Q. So was it always just complaints you were receiving?</p> <p>24 A. Well, this isn't a complaint.</p> <p>25 Q. No, well that's point.</p>
<p style="text-align: center;">Page 13</p> <p>1 number of queries from third party banks asking me why      2 I'm setting Bank of America's US Dollar LIBOR where they      3 are. I can genuinely say that this is where we are      4 attracting funding into the bank but I can understand      5 their frustration because it is entirely clear that the      6 broker market for cash is clearly 15 to 20 basis points      7 higher than US dollars LIBOR. The reason third party      8 banks are asking is that they're clearly finding it      9 impossible to fund loan agreements denominated in US      10 dollars at LIBOR, even at the shorter end of the      11 maturity spectrum, three months and in.</p> <p>12 "Yesterday's turn action facility results from the      13 Federal Reserve demonstrated that there was demand from      14 European and US banks for secured funding from the Fed      15 for 28 days at one month LIBOR plus 10 basis points ..."</p> <p>16 Then it talks about the auction adding a significant      17 amount of liquidity:</p> <p>18 "I know there's little point convening to discuss      19 with the panel banks. I just thought it would be useful      20 for you to know the same market dynamics (FX swap,      21 counterparts acknowledge that they issue at LIBOR plus      22 a spread) are still in operation. However, third party      23 analysts are writing about the turn auction facilities      24 saying about LIBOR and I imagine there may be financial      25 press articles to follow."</p>	<p style="text-align: center;">Page 15</p> <p>1 A. So what -- because, as I have said, the BBA's not active      2 in the market so it doesn't conduct any borrowing or      3 lending. It's a trade association so we would seek to      4 get information from people who were market      5 participants, like, for example, the Foreign Exchange      6 and Money Markets Committee. The reason that I say in      7 my e-mail back to Dan, "I'm not surprised to hear this"      8 is because what he's saying here, which is, "I'm a big,      9 strong bank, I can fund at a lower level. The markets      10 are very stressed. Other banks, who used to be able to      11 fund at the same level as me, can't and don't like it",      12 I would hear that. That was a major theme in 2007/2008.</p> <p>13 Q. Very well. Let's move on then to JEX/054, which is your      14 page 235. This was a telephone conversation between you      15 and Clive Jones of Lloyds TSB. We bear in mind the      16 date, 17 April of 2008. Do you remember this is the one      17 where Mr Jones and you are talking about, if you go to      18 the end of the document just so we have it in context,      19 the fifth page of this-- your page 239-- toning it      20 down, toning something down; yes?</p> <p>21 A. Yes.</p> <p>22 Q. You were being asked about what was being toned down.      23 Can we look at this and just pick out a few phrases      24 which might help us identify what you and Mr Jones are      25 here referring to because at the bottom of the page</p>

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<p>1 there's clearly unhappiness about the Bloomberg article      2 and a quote that seems to have been taken out of      3 context.      4 Over the page, page 2 of 5 -- sorry, go down to the      5 first page of that, please. At the bottom of the page      6 there's the unhappiness about the quote out of context      7 at Bloomberg.      8 Over the page, please. Having spoken about      9 journalists, go down to the bottom, please, because      10 there Mr Jones is talking about:      11 "My view I'm trying to say if you think I'm just      12 a bloke that's flown in from some island, picked up      13 a couple of newspapers and read stuff, I would read that      14 this note is what is being referred to here. It's going      15 along with that article because we -- so some of the      16 wording like 'unexpected behaviours' and then when --      17 then I'm not so worried about the fact that it's going      18 to go out to."      19 He clearly said "unexpected behaviours" in a way      20 which has caused the author of this, the transcriber of      21 this, to put it in inverted quotes; yes?      22 <b>A. Hmm, hmm.</b>      23 Q. Then over the page, please, he repeats, at line 81, the      24 reference to "unexpected behaviours".      25 At line 87:</p>	<p>1 <b>A. Yes.</b>      2 Q. Can we please just see what is there being referred to.      3 Can we put up on screen from the large bundle page 478.      4 I'm going to ask that you at least have it in hard copy      5 form. (Handed)      6 So this needs to be read in the context of what      7 we've just seen. This in fact in this form a draft of      8 a letter to LIBOR contributors of 17 April 2008. Do you      9 remember this at all?      10 <b>A. I remember that there was -- I remember --</b>      11 Q. Can we have the whole page on screen, please.      12 <b>A. -- there was a letter from Angela to the contributors,</b>      13 <b>yes.</b>      14 Q. Although we can see this is a draft, if we look at the      15 third page of this document, so page 480, just looking      16 at that distribution list we can see that it says:      17 "The 17 April 2008 letter went to the following ..."      18 It then gives a very wide circulation list. Can you      19 help us, please, with that circulation list?      20 <b>A. I recognise almost all of the names and I think to be</b>      21 <b>sure -- I mean, the clue is on a couple of pages back</b>      22 <b>which is it's the designated senior treasury contact in</b>      23 <b>each LIBOR contributor bank.</b>      24 Q. So we've seen that at page 478. Just to put that      25 therefore into the context of that phone call of that</p>
<p style="text-align: center;">Page 17</p>	<p style="text-align: center;">Page 19</p>

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<p>1 markets is abnormal and this in turn impacts BBA LIBOR,      2 nevertheless there is a need to ensure the reputation      3 and integrity of Dollar LIBOR in particular and the      4 benchmark as a whole. BBA LIBOR fixings are relied upon      5 extensively to price global financial products and      6 instruments, including a large percentage of global      7 swaps, a significant number of US mortgage products. It      8 is therefore one of the pillars of the financial system.</p> <p>9 "As of today the BBA will bring forward our      10 scheduled annual review of all the BBA LIBOR procedures      11 and processes. This is already underway but given      12 current market conditions we will expedite the review      13 process.</p> <p>14 "In addition, we will also ask the Foreign Exchange      15 and Money Markets Committee which oversees the rates to      16 review aspects of the BBA LIBOR framework, including      17 definitions and the instructions to contributors,      18 examine thoroughly all the individual market data      19 received via the market surveillance tool, investigate      20 any continuing anomalies in market behaviour, take steps      21 to rectify any aspects of the process.</p> <p>22 "I hope you agree that this action is appropriate      23 and justified and I will welcome an early discussion      24 with your treasury executives and dealing desk.</p> <p>25 "This letter will also be shared externally</p>	<p>1 <b>A. I don't recall.</b>      2 Q. Then can we turn on, please, to JEX/055. I just have      3 a couple more documents that I would like you to      4 consider. Your bundle at page 240. You were taken to      5 this document yesterday. We can see at the top it's      6 a report on 2008 panel bank review, dated 18 April      7 of 2008. The first three lines your attention was drawn      8 to:      9 "General consensus is that US Dollar LIBOR is      10 currently inaccurate by 20 to 30 basis points while      11 sterling and euros is within reason reliably accurate.      12 This is due to current market pressures leading banks to      13 post artificially low rates to protect themselves,      14 causing many to question US Dollar LIBOR reliability."      15 If we go to the bottom of that page, your attention      16 was drawn to the foot. Can we blow up the right-hand      17 side of that footnote:      18 "Summary of Panel Banks Feelings\Final 2008      19 Report.doc ..."      20 It has a date, but that's a print date so we can      21 ignore that, 3 March 2015, but your reference was drawn      22 to the fact that it was describing itself as "Final 2008      23 Report". You told us yesterday that you didn't think      24 that was the final report?</p> <p>25 <b>A. I don't believe it is.</b></p>
<p>Page 21</p> <p>1 following the public interest in this issue."</p> <p>2 Can I ask you, Mr Ewan, did you yourself play any      3 part in the drafting of that letter or was that done by      4 or on behalf of Ms Knight? Do you remember now or not?</p> <p>5 <b>A. I don't remember specifically. It is likely that I had      6 some input into it, but I think a letter such as this,      7 that's going out underneath Angela Knight's signature,      8 she would certainly have had the last review of it.</b></p> <p>9 Q. This is the one that Mr Jones, if I paraphrase, is      10 saying, "This is just too blunt"?</p> <p>11 <b>A. Yes.</b></p> <p>12 Q. Was it intended to be blunt?</p> <p>13 <b>A. Yes.</b></p> <p>14 Q. We know that at that time you have referred your      15 unhappiness about the Bloomberg article which talked      16 about -- I'm not going to go back to it -- the BBA      17 saying they will throw people out of the pond if they      18 don't behave properly. Again, I'm paraphrasing.</p> <p>19 <b>A. Right.</b></p> <p>20 Q. At that time, by April of 2008, what currencies did you      21 have issues with or were there concerns about or      22 concerns were raised about?</p> <p>23 <b>A. It was overwhelmingly Dollar LIBOR.</b></p> <p>24 Q. Were any complaints brought to your attention about Yen      25 LIBOR?</p>	<p>Page 23</p> <p>1 Q. Just go on then, please. Can we look at JEX/067.</p> <p>2 Sorry, before we do that, JEX/064, please, your      3 page 256. We know in fact that subsequent to the date      4 of the report we've just seen there were further      5 relationship visits so we have, for example, here, Bank      6 of Tokyo-Mitsubishi. At the footer we can see that this      7 is a document of 7 May. It's virtually impossible to      8 read but it's a bit better like that. So we can see      9 that's part of the relationship visits.</p> <p>10 At the top of that page, we can see that the comment      11 made is:</p> <p>12 "BBA LIBOR as a whole has kept its role well amid      13 the current financial market crisis compared to other      14 indices. BBA needs to explain more positively about      15 current definitions and instructions to panel banks and      16 the wider public."</p> <p>17 It goes on from there, together with pros and cons      18 of LIBOR, as set out by those representatives of Bank of      19 Tokyo-Mitsubishi.</p> <p>20 At JEX/065, your page 258, this is a relationship      21 visit with Citibank. You were taken to this. I'm not      22 going to look at it in any detail therefore. We see at      23 the bottom of that, again in the footer -- file path is      24 probably more accurate -- 7 May 2008.</p> <p>25 Then let's go on, please, to JEX/067. We now have</p>

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<p>1 a report on 2008 panel bank review -- sorry, page 262,  2 my Lord.</p> <p>3 <b>A. Thank you.</b></p> <p>4 Q. Dated 13 May of 2008. In the summary -- I'm not going  5 to go through the entirety of it -- it has:</p> <p>6 "The current prices is even though unclear not  7 complete and many will continue defensive stances to  8 protect their balance sheets. The crux of the problem  9 is a lack of confidence in all areas of the market ..."</p> <p>10 I suspect that should be "money markets", shouldn't  11 it?</p> <p>12 <b>A. Yes.</b></p> <p>13 Q. "... which has led to interbank lending to become  14 relatively non-existent beyond three months and nearly  15 all trades are under one month unless a high premiums  16 paid. The Bank of England's new swap initiative is  17 being viewed as a positive step, as positive news but  18 many still feel it has taken too long. General  19 consensus regarding BBA LIBOR fixings are that they  20 reflect the stress in the market at the moment but US  21 Dollar LIBOR is currently inaccurate, while sterling  22 and euros is within reason reliably accurate. The  23 current market pressures and the stigma attached to  24 being a high outlier have led to reports that some banks  25 are posting artificially low rates to protect themselves</p>	<p>1 <b>importance, the importance that it was accurate and we  2 wanted everybody to have a fair say, not just  3 participants, not contributors but everybody to get  4 a fair say as to, "Look, what can we do to try and  5 ensure that this rate is accurate in these  6 unprecedently stressed times".</b></p> <p>7 Q. So that takes us through the summer of 2008. Can we  8 then go, please, to JEX/091. You need to jump ahead to  9 page 347. Now, this was a response to the governance  10 and scrutiny paper from UBS, Mr Kousogiannis; yes?</p> <p>11 <b>A. Yes.</b></p> <p>12 Q. At page 18 of that document in the internal numbering --  13 your page 365 -- do you remember we looked at this  14 yesterday, where the author of the document is making  15 a suggested change to appendix 2? It was suggested, and  16 rightly, albeit with a little amplification, that what  17 is there set out was subsequently adopted. You weren't  18 clear about that yesterday, but in fact if we look at  19 appendix 2 we can see that with some amplification that  20 part at 2 was adopted in the appendix 2 terms of  21 reference.</p> <p>22 <b>A. Okay.</b></p> <p>23 Q. Just for reference, rather than to go to it  24 unnecessarily, core bundle A/10 to 12, my Lord.</p> <p>25 The document continues in that purple track change.</p>
<p>Page 25</p> <p>1 but recent times have seen this situation improve. This  2 has raised questions about US Dollar LIBOR's reliability  3 highlighted in the media and suggestions offered to  4 improve the accuracy of BBA LIBOR range from a delicate  5 touch to a full upheaval."</p> <p>6 I appreciate I'm only showing you the first page of  7 that. The document continues across a number of pages.  8 Can you help as to whether -- I appreciate you're  9 looking back a long period of time -- that was the final  10 version or was there still something beyond that, or can  11 you not say?</p> <p>12 <b>A. I couldn't say but it does seem to post-date the  13 previous document we looked at.</b></p> <p>14 Q. Then we know that in the summer of 2008 there was the  15 consultation. We have the document in our core bundle.  16 How important was that consultation from your point of  17 view?</p> <p>18 <b>A. I think it was one of the most important things I did  19 whilst I was at the BBA.</b></p> <p>20 Q. Just in a sentence or so, and I appreciate I'm asking  21 you something that may be difficult, but try if you can  22 in a sentence or so, why was it one of the most  23 important things?</p> <p>24 <b>A. Because we understood the importance of LIBOR to the  25 financial markets and therefore because of its</b></p>	<p>Page 27</p> <p>1 This is from UBS. Those changes, we know, are from UBS.  2 "We believe that there is a fundamental conceptual  3 difficulty with a proposed current wording of clause 2  4 which is set out above. We believe that all banks  5 accept that accountability for the submitted rates  6 should rest solely with the cash trading desks.  7 However, the cash trading desks do not work in a vacuum  8 and their perception of the rates at which the bank can  9 borrow at any given time is bound to be indirectly  10 influenced by the information that they receive during  11 the ordinary course of their working days from a variety  12 of sources. This information may be sourced from the  13 media through their interaction with other parts of the  14 bank or the market for the proper discharge of their  15 many daily functions as a busy cash trading desk.  16 "We therefore consider that the current proposed  17 wording of the BBA does not accurately reflect the  18 reality of the situation and that as a practical matter  19 it would be impossible for the cash desk to analyse the  20 source of all the data on which good faith perception of  21 the banks' cost of borrowing cash is based."  22 Then it sets out why they hope that the  23 reformulation is effectively helpful; all right?</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. But it talks about the good faith perception of the</p>

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1 banks' cost of borrowing cash; yes?  
2 **A. Yes.**  
3 Q. How important is the fact that the perception is good  
4 faith or is made in good faith?  
5 **A. Well, that's fundamental.**  
6 MR CHAWLA: Thank you, Mr Ewan. That's all I ask.  
7 MR JUSTICE COOKE: Thank you very much. Those are all the  
8 questions for you. You can go.  
9 **A. Thank you very much.**  
10 **(The witness withdrew)**

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**Attachment 2**  
**Oral Argument Transcript**



H1QQALL-COA

1                   JUDGE CABRANES: We will hear counsel now in United  
2 States v. Anthony Allen and Anthony Conti.

3                   Mr. Schachter, while you're getting ready, permit me  
4 to make a preliminary statement which is actually relevant to  
5 both sides, and the government will be able to comment on this  
6 when they address the Court.

7                   Both sides will have the time necessary for their  
8 argument. We've given you more than usual, and you are lucky  
9 that there is nothing else this morning; and I assure you, you  
10 will have time necessary for your arguments.

11                  That said, I have some threshold, possibly non-record  
12 inquiries, by which I mean that I, speaking for myself only,  
13 would welcome your description of the human and prosecutorial  
14 context here. The general public, as well as the court, are  
15 entitled to understand how and why this prosecution was  
16 undertaken, or any prosecution was undertaken. And this is an  
17 unusual and complicated case where the two defendants are U.K.  
18 nationals, they are young and relatively low-level employees,  
19 and they worked in London for a Dutch bank which may be a  
20 household name in The Hague but not in my parochial American  
21 world. The case is also brought by so-called Main Justice, not  
22 by a prosecutorial office, that certainly regards itself as  
23 second to none in securities and financial prosecutions.

24                  Now, all of this is a puzzlement to me, and  
25 interesting, at least, so maybe you can give us a description

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1       of what was going on here in a way that's comprehensible to  
2       non-specialists. I know you're geared up with large questions  
3       of statutory construction and constitutional issues, all of  
4       which we'll hear, but we want to get a little context here.

5                   MR. SCHACHTER: May it please the Courts, this is a  
6       topic which I am very pleased to begin with, and the answer to  
7       your Honor's question is I have not the slightest idea.

8                   When I was informed that the Justice Department  
9       intended to indict my client, I went to them and said, why in  
10      God's name would the Justice Department need to prosecute these  
11      British citizens for conduct which occurred exclusively in  
12      London where the cooperating witnesses are not U.S. citizens,  
13      where it is all about the alleged involvement of or it's  
14      responding to questions that are posed by a British banking  
15      trade organization about a rate which is set at 11:00 London  
16      time, why is it necessary to drag this British citizen to stand  
17      trial here thousands of miles from home and from his family?  
18      He has young children. It was a burden for his parents, who  
19      are elderly and came to stay in New York for the length of this  
20      trial, and to what end? So that we can incarcerate this  
21      British citizen thousands of miles from home where it would be  
22      a great burden for their family to visit them? I said why?  
23      Now, there may be a circumstance --

24                  JUDGE POOLER: I don't want you to lose track of Judge  
25       Cabranes' question, but were there prosecutions in Britain?

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1                   MR. SCHACHTER: Absolutely. And what I said to the  
2 justice department was there may be circumstances where no  
3 other government is addressing this harm, and it is a global  
4 harm, where the United States Justice Department feels that  
5 they need to step in, but I noted that there were extremely  
6 active British prosecutions, there were investigations being  
7 undertaken of exactly the same conduct in London. In fact,  
8 there were active investigations of our clients.

9                   The financial conduct authority, their version of the  
10 Securities and Exchange Commission, is an issue which is  
11 created by what the government did in this circumstance. They  
12 had an investigation that was active. They knew they had an  
13 active investigation. They were working very closely with the  
14 serious fraud office in the U.K. What is the possible reason  
15 why it was necessary for the United States to spend taxpayer  
16 resources to prosecute this British citizen and incarcerate him  
17 here in the United States?

18                  JUDGE LYNCH: Are you aware of other LIBOR-related  
19 prosecutions brought in the United States?

20                  MR. SCHACHTER: Subsequent to ours. Ours was the  
21 first. Then subsequent to that, there have been other charges  
22 and there are cases pending. There are other cases in the U.K.  
23 which have been prosecuted: Some successfully, some  
24 unsuccessfully.

25                  JUDGE LYNCH: I meant here.

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1                   JUDGE CABRANES: Where are they pending in the United  
2 States, do you know?

3                   MR. SCHACHTER: They are brought by the fraud section.  
4 I am not positive, but I believe they were all filed in the  
5 Southern District of New York, but all being prosecuted by Main  
6 Justice with no involvement from the Southern District of New  
7 York.

8                   JUDGE LYNCH: There were days when U.S. Attorneys for  
9 the Southern District of New York threatened to resign over  
10 things like that.

11                  MR. SCHACHTER: I understand that.

12                  JUDGE LYNCH: But it isn't, after all, the sovereign  
13 district. It is a branch of the Justice Department in its own  
14 little way.

15                  MR. SCHACHTER: As a very technical matter, I know  
16 some former U.S. Attorneys that would maybe disagree with that  
17 statement. But, no, it was very troubling.

18                  In fact, one of the central issues in our case is that  
19 there is a critical witness, the LIBOR secretary from the  
20 British Bankers Association, John Ewan, he absolutely would  
21 have been available to us to have him testify if Mr. Allen and  
22 Mr. Conti were prosecuted in the United Kingdom. And, in fact,  
23 when he testified, in some circumstances there have been  
24 acquittals, according to the news reports. This is all outside  
25 the record. But according to the news reports, it is largely

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1       based on his testimony, because his testimony, which we quote  
2       from his testimony in the U.K., is that in the British Bankers  
3       Association's view, you commit no falsehood if you submit a  
4       LIBOR rate which is anywhere within the range of reasonable  
5       estimates of a bank's borrowing costs, whether it's the highest  
6       or the lowest.

7           We think that if the jury here had the opportunity to  
8       hear Mr. Ewan's testimony, that that would have been a basis  
9       for them to acquit. We certainly think they would have  
10      acquitted. You would have had the entity which set up this  
11      construct which says this is OK with us; we don't consider it  
12      to be a falsehood as long as it is a reasonable estimate of a  
13      bank's borrowing costs.

14           JUDGE POOLER: Have there been any convictions in  
15       Britain?

16           MR. SCHACHTER: Yes.

17           JUDGE POOLER: So, in spite of this testimony, there  
18       have been convictions?

19           MR. SCHACHTER: Well, the evidence with respect to  
20       certain people was mixed. So, for example, the first  
21       conviction, and the most well-known in the U.K. is that of a  
22       man named Thomas Hayes. Mr. Hayes was bribing brokers through  
23       wash sales in order to get them to spread false information, in  
24       order to recommend that a trader submit false information to  
25       the British Bankers Association. That's a horse of a different

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1 color.

2 JUDGE POOLER: It wasn't within the reasonable rates  
3 is what you're saying.

4 MR. SCHACHTER: Correct.

5 JUDGE POOLER: And that's when it becomes false and  
6 fraudulent.

7 JUDGE LYNCH: On the record that we have, as opposed  
8 to the one that we might have had if Mr. Ewan had been allowed  
9 to testify, is there not plentiful evidence, including from one  
10 of your experts, that what the purpose of LIBOR was, was to set  
11 a benchmark for what is the best borrowing rate for the best  
12 customers?

13 MR. SCHACHTER: Well, I think it is -- aside from the  
14 word "best," the purpose is to get banks to submit their  
15 reasonable estimates of where they can borrow.

16 JUDGE LYNCH: So, if I'm asked what's the best rate at  
17 which -- someone says to me, you have a good credit rating.  
18 I'd like to know for my purposes what a person with a good  
19 credit rating could borrow at, and I know from my experience  
20 that my bank would give me a loan at 5 percent. I also know  
21 that the loan shark operating out of the bar on the corner  
22 would be happy to lend me money at 25 percent for two weeks. I  
23 also know that there are other lending agencies that might  
24 charge 6 or 7. I'm entitled to say 12 because that's somewhere  
25 in the range? I mean, that would be a truthful answer to that

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1 question?

2 MR. SCHACHTER: I don't know that it would be. That's  
3 not our facts.

4 JUDGE LYNCH: I don't know that it isn't your facts.

5 Your facts are that an agency that is trying to set a  
6 benchmark -- and I have a problem with the exclusion of Ewan's  
7 testimony because that could problematize this, but on the  
8 record that we've got, they're asked for an honest estimate.  
9 They're not asked pick a number in a range. They're not  
10 asked -- the literal question that's asked is certainly not:  
11 Give us a number that falls somewhere in the ballpark of what  
12 you might be able to borrow at. They're asked, what's your  
13 estimate? What's the number at which you could borrow? And  
14 there's evidence that your clients calculated such a number,  
15 and then were responsive to somebody who said, you know, it  
16 would be good for us to submit a different number than that.

17 Now, I don't understand why -- again, we're not  
18 talking now at the moment about the evidentiary issues, but as  
19 a matter of what is false and fraudulent, is there not  
20 plentiful evidence from which a reasonable jury could conclude  
21 that they were asked what is their estimate, and they did not  
22 give their estimate; they gave something else that was not  
23 their honest answer to that question. Tell me what's wrong  
24 with that as a theoretical matter of what's a crime under the  
25 wire fraud statute.

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1                   MR. SCHACHTER: I'll answer it two ways. First, there  
2 was not evidence that that occurred. Rather, I think it's  
3 important to discuss a little bit the construct here.

4                   The question, at what rate could you borrow -- this is  
5 the question posed by the BBA: At what rate could you borrow  
6 funds if ordered to do so by asking for and then accepting  
7 interbank offers in reasonable market size just prior to 11:00?  
8 The question was posed for 15 different time periods, from  
9 overnight to 12 months.

10                  It is undisputed that banks did not borrow for a vast  
11 majority of those purposes. There was no interbank borrowing.  
12 It was undisputed that this is a subjective estimate and not  
13 more than that. It is not transaction based. Nobody is  
14 required to look to --

15                  JUDGE LYNCH: But they're asked for their subjective  
16 estimate. It's not a case where they're asked what is the  
17 scientific fact, and, alas, there is no such thing, so there  
18 can't be a falsehood. They're asked for their estimate. And  
19 the question is, did they give their honest estimate or did  
20 they give a falsehood that was convenient to them rather than  
21 their best guess.

22                  If you asked me what's your estimate of how many  
23 points the Patriots are going to score in the Superbowl --

24                  JUDGE CABRANES: Judge, why don't we let him answer  
25 the question as opposed to going into compound and paragraph?

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1                   MR. SCHACHTER: There is no evidence that the  
2     estimates were not honest in that they were accurate. There is  
3     no evidence that either appellant believed that they were  
4     submitting a rate which they did not believe to be an accurate  
5     answer, a fair and reasonable estimate. There is no evidence  
6     that supports that. In fact, the evidence was that there was  
7     -- in fact, part of the government's submission is that there  
8     was a range of accurate estimates.

9                   JUDGE LYNCH: But are they asked for a fair estimate  
10    or are they asked for their opinion?

11                  MR. SCHACHTER: The question that your Honor poses  
12    suggests that there is only one answer to the question, and the  
13    evidence was to the contrary. In fact, the government's  
14    cooperating witness, Mr. Yagami, whose testimony is at page 265  
15    of the joint appendix, he testifies there is no one correct  
16    number.

17                  Mr. Robson at the beginning of his direct testimony is  
18    asked by the prosecutor to basically describe the scheme, and  
19    he says -- I'm quoting. This is page 225 of the appendix.  
20    "So, there would be kind of a range of two or three numbers  
21    where LIBOR could possibly be."

22                  The question, by the way, is:

23    "Q. First explain again what you did." That's the question  
24    posed by the prosecutor.

25                  Here is Mr. Robson, the principal cooperating witness'

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1 opportunity to explain the scheme. And he says, "So, what I  
2 would do is I would ask the interbank broker where he felt the  
3 LIBORs would be. There would be kind of a range of two or  
4 three numbers where LIBOR could possibly be." This is quoted  
5 at page 19 of our brief. "So, for example" --

6 JUDGE CABRANES: This is the government witness?

7 MR. SCHACHTER: The government witness, direct  
8 examination at the outset of Mr. Robson's testimony.

9 He says, "There would be kind of a range of two or  
10 three numbers where LIBOR could possibly be. So, for example,  
11 if the broker came on and said three months, I think I'm  
12 hearing might be 80, might be 85, might be 90, but probably  
13 75." He says, "I would go down the middle."

14 And then the government asks:

15 "Q. Now, let's say you in fact had a trader request where a  
16 trader wanted you to submit a LIBOR to favor their position.  
17 So what would you do?

18 "A. So, given those circumstances, if one of the traders had  
19 contacted me and said three months, if I needed a higher three  
20 months, I would have moved it higher at his request, I would  
21 have moved it towards the 90 level or set 90." In other  
22 words --

23 JUDGE LYNCH: What's he moving?

24 MR. SCHACHTER: He's moving his estimate.

25 JUDGE LYNCH: He selected an estimate and then he

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1       moved that estimate. He had got a range -- no question, he got  
2       a range of information. He took that information into account.  
3       He said, well, the best I can do is average it. And then  
4       somebody says, don't average it, give the high end of the range  
5       because that's what we want. And then he, in his words, bumps,  
6       right, he moves the estimate?

7                    MR. SCHACHTER: He selects in the range of accurate  
8       estimates that he could provide --

9                    JUDGE LYNCH: I understand -- maybe we're just talking  
10      at cross purposes as to what is an estimate. I mean, there are  
11      lots of things that one could be asked to estimate and it  
12      wouldn't be wrong.

13                  You can't say -- if I say, oh, the Patriots are going  
14      to score 40 points in the Superbowl. You can't say that's  
15      wrong. Who knows?

16                  But if I'm asked what's your estimate, and I pick one,  
17      and then somebody else says, wait a minute. Tell him something  
18      else because that's better for you because you got a number in  
19      a pool or something. That's a lie, if I say my estimate is 40  
20      points when my estimate is really 28.

21                  MR. SCHACHTER: Respectfully, I disagree, and here is  
22      why: If you're asked for an estimate, and there may -- an  
23      estimate is inherent generally in estimates, and it certainly  
24      is the evidence in this case that there certainly was no one  
25      right answer. You could choose three. Assume you could choose

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1 three answers. You could choose 75, 80, 85. They're all the  
2 same. They're all equally accurate. And you select one  
3 accurate answer as opposed to another accurate answer because  
4 it will help your employer, which is as an employee what you  
5 have a fiduciary obligation to do. If you simply are selecting  
6 one accurate answer as opposed to another accurate answer, that  
7 is not wire fraud.

8 JUDGE LYNCH: No, an answer that is accurate in the  
9 sense you're saying is, if I honestly thought this, no one  
10 could quarrel with me. But I'm asked for what I honestly  
11 think, and if I don't give the answer that I honestly think, I  
12 mean that is standard that that's a fraud.

13 MR. SCHACHTER: A hundred percent I agree. There was  
14 no evidence of that.

15 Had the government presented any evidence that the  
16 appellants disbelieved the opinion that they were providing --  
17 and the statement of opinion in answering the BBA's query is, I  
18 believe that Rabobank can borrow at 3.10 percent for six  
19 months. That's my estimate. That's what I believe. Had the  
20 government presented any evidence that the appellants in fact  
21 didn't believe -- they thought no way 3.0. In fact, three or  
22 four, if there had been evidence of that, then I would agree  
23 with your Honor. However, there was no evidence. That's our  
24 argument. That's our point. There was no evidence that they  
25 disbelieved. And in fact in the way the offense was described

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1 to the jury by both the prosecutors and Judge Rakoff, the jury  
2 wasn't asked to determine that. They weren't asked to  
3 determine falsehood.

4 I would just like, if I may, to quote from the  
5 prosecutor's summation. "If you find that the defendants took  
6 part in the scheme to base Rabobank's LIBOR submissions, at  
7 least in part, on trading positions, you should convict.  
8 Regardless of whether the submission was inside or outside of  
9 some so-called range, you should convict." It's quoted at page  
10 339 of our appendix.

11 So the government is telling the jury, look, all you  
12 need to find is that one of the considerations in their mind  
13 when they selected a perhaps accurate estimate was what would  
14 benefit their employer. If they did it, that's wire fraud.  
15 And that's not the law.

16 JUDGE POOLER: Counsel, my question is, if they  
17 submitted a bid that was outside the range of numbers that they  
18 had accumulated from talking to their brokers on the basis of  
19 the request of a trader, would that be fraud?

20 MR. SCHACHTER: That very well may be because then the  
21 circumstance would be that there would be evidence that the  
22 defendant disbelieved the opinion that he was providing.

23 JUDGE POOLER: And there was no such evidence in this  
24 trial?

25 MR. SCHACHTER: There was no such evidence, and even

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1 more importantly, the jury wasn't asked to consider that,  
2 because they were told that the wire fraud offense here was  
3 submitting a rate which may be within the range. It may be  
4 believed by the defendant to be an honest answer, an accurate  
5 estimate; but if they took into account what would benefit  
6 their employer, then they were told that's the crime that they  
7 are charged with.

8 Over our vigorous objection, that's how Judge Rakoff  
9 described the offense to the jury, which we believe was a  
10 constructive amendment because that's not in the indictment.  
11 That is not the theory that's articulated in the indictment.  
12 The indictment articulates a fraud theory. They say that they  
13 chose a rate that was not what they perceived to be what  
14 Rabobank could borrow money at. That would be fraud.

15 JUDGE LYNCH: Could you elaborate on what Mr. Ewan  
16 would have testified? Could you give me two or three of the  
17 best quotes for what he would have said about what the question  
18 meant?

19 MR. SCHACHTER: Quoted at page 691 --

20 JUDGE CABRANES: If you permit me, Judge, maybe he can  
21 as a threshold to your question -- which he should, of course,  
22 answer -- tell us what exactly happened as to his testimony.  
23 Who wanted what and why was he not permitted?

24 MR. SCHACHTER: He was not permitted because the Court  
25 ruled that his testimony was not relevant. Here is what

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1       happened --

2                     JUDGE CABRANES: Answer the Judge's question.

3                     MR. SCHACHTER: I can lay out the timeline.

4                     At Mr. Allen's arraignment on March 20 of 2015, we  
5                     alerted the district court that we anticipated to move for Rule  
6                     15 depositions. We thought that was going to be a real  
7                     possibility, given the fact that all of the witnesses and all  
8                     of the conduct occurred outside of the United States.

9                     On April 21, 2015, so just one month after the  
10                    defendant's arraignment, we reminded Judge Rakoff that we  
11                    believed that we would need to move for Rule 15 depositions,  
12                    but it's a difficult position to necessarily identify -- what  
13                    we were effectively doing was identifying trial witnesses one  
14                    month into the case, and we needed to time to review the  
15                    hundreds of thousands of documents which were going to be  
16                    provided to us in discovery.

17                    In June of 2015, Mr. Ewan testified in the United  
18                    Kingdom. And then two weeks later the Justice Department filed  
19                    a superseding indictment. That's June 25. We received  
20                    documents from the government relating to the British Bankers  
21                    Association and Mr. Ewan on June 26. And within a matter of  
22                    weeks after that -- so that's June 26. On July 14, we told the  
23                    Court that we intended to request Mr. Ewan's deposition, and  
24                    the district court ordered us to file our motions by July 24.  
25                    We filed our motions on July 24 and Judge Rakoff denied the

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1 motion on August 18.

2           We thought this was a critical witness, and one of the  
3 reasons was his testimony -- I'm quoting, and this is at page  
4 691 appendix. This was his sworn testimony in the United  
5 Kingdom: "A panelist who can borrow in reasonable market size  
6 at any one of a wide range of offered rates commits no  
7 falsehood if she bases her response to the daily LIBOR survey  
8 upon the lowest of these or the highest or any arbitrary  
9 selection from among them."

10           If Mr. Allen and Mr. Conti were prosecuted in the  
11 United Kingdom, the jury would have heard that testimony, but  
12 because Main Justice decided to prosecute them here in the  
13 United States, the jury never heard that testimony. We think  
14 that that would have made a significant difference.

15           JUDGE POOLER: The government decided to prosecute  
16 because even though they could pick a number within the  
17 reasonable range, they were influenced by the request from  
18 traders to pick a certain number. I'd like it high on the  
19 three-month rate, and that is the intent part of the fraud,  
20 correct?

21           MR. SCHACHTER: Correct.

22           JUDGE POOLER: So why isn't it a complete fraudulent  
23 act?

24           MR. SCHACHTER: Well, several issues. This Court in  
25 the Countrywide decision made very clear that bad faith or

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1        impure thoughts does not give rise to fraud. You need a false  
2        representation or a misleading half truth or an omission, and  
3        it was conceded below that this case was not based on  
4        omissions. You need the *actus reus*, not simply the state of  
5        mind.

6                   JUDGE POOLER: Your argument is they had impure  
7        thoughts, but there was no fraudulent act. Is that your  
8        argument?

9                   MR. SCHACHTER: Well, I guess I would put it somewhat  
10      differently. Certainly, there was no impure act, but I would  
11      even quarrel to some extent with the impure thoughts. The  
12      thought that they had was that this will benefit their  
13      employer. These prosecutions we detailed, and this is at  
14      sentencing, but there are more than 125 people that were  
15      engaged in identical conduct. In fact, the Bank of England  
16      called Barclays and told them that they should put their LIBOR  
17      submission low because they were worried about the general  
18      economy. So, what the thoughts of these people were, they're  
19      an employee and they're helping their employer.

20                  I think that the thought process was something along  
21      the lines of: As long as I'm answering the question  
22      accurately, in other words, I'm providing -- there is no one  
23      answer. During the financial crisis, there is no interbank.  
24      That's when most of our relevant time period is, the financial  
25      crisis. There is no interbank borrowing at all. Banks do not

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1 borrow from one another, and yet they are called upon to submit  
2 a LIBOR rate, which is what rate can you borrow. It is a very  
3 wide range --

4 JUDGE LYNCH: In fact, Mr. Ewan's testimony, it seems  
5 to me, goes directly to the question, what is it that they are  
6 being asked, right? I mean, the testimony in the record on  
7 that, from the government's expert witness at least, is  
8 somewhat to the contrary in terms of what he thinks they were  
9 supposed to do, which is, as I was trying to suggest, to give  
10 their best estimate; not to pick a number in a range. But  
11 Mr. Ewan seems to say the opposite, and he was unwilling to  
12 come to the United States to give that testimony.

13 MR. SCHACHTER: That is certainly correct.

14 JUDGE LYNCH: And you asked to do what you do when a  
15 witness is unavailable, which is to do a Rule 15 deposition,  
16 and the government opposed, and the judge didn't let you do it.

17 MR. SCHACHTER: That is absolutely correct. And with  
18 all due respect to this business school professor from  
19 California that the Justice Department flew in to testify, his  
20 knowledge of how to interpret the BBA's question is no greater  
21 than any of ours. There is no book of rules from the British  
22 Bankers Association --

23 JUDGE LYNCH: I mean, there doesn't need to be a book  
24 of rules necessarily. There's a reasonable way of interpreting  
25 this question based on what the purpose of this is, and the

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1       jury had certain information from an expert that goes to that.  
2       Whether or not you are right about the argument that there is  
3       no possibility of a crime here, you've also got the argument  
4       that the jury was not permitted to hear all of the evidence  
5       that bears on the question of how the question should be  
6       interpreted.

7                    MR. SCHACHTER: That is absolutely correct. And even  
8       Mr. Harris, the government's expert, testified that this is an  
9       estimate, it's subjective; and during most of these time  
10      periods there is no interbank borrowing whatsoever from which  
11      these traders are to draw on to come up with a number to submit  
12      each day.

13                  JUDGE CABRANES: Do we know from the record or do we  
14      care why Mr. Ewan couldn't come to testify? Does it matter?  
15      Maybe he just didn't want to get on a plane, which is fine.  
16      I'm just wondering whether there was something in the record we  
17      should know.

18                  MR. SCHACHTER: I don't think so.

19                  JUDGE CABRANES: What was your argument on behalf of  
20      the Rule 15 deposition, which was denied?

21                  MR. SCHACHTER: Well, it wasn't --

22                  JUDGE CABRANES: He doesn't want to come? He's  
23      available in London?

24                  MR. SCHACHTER: We were informed by his counsel that  
25      he would not come. So, the only way to have this testimony

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1 presented before the jury is to take his Rule 15 deposition.

2 JUDGE LYNCH: You might want to stay out of the United  
3 States if you're anywhere near LIBOR with --

4 MR. SCHACHTER: I think that's true.

5 JUDGE LYNCH: He just might not want to get in an  
6 airplane.

7 JUDGE CABRANES: What's the theory of denial, if you  
8 can refresh our recollection? I know that in fast-moving  
9 prosecutions or hearings -- and all hearings before Judge  
10 Rakoff are fast moving, but what's the reason for denying? Do  
11 we know what the reason is for denying the Rule 15? It seems  
12 like a simple enough motion.

13 MR. SCHACHTER: I think I have trouble articulating  
14 the basis for why his testimony would not meet the relevance  
15 standard. I think for Rule 15 standard, it has to be highly  
16 relevant, not just 401, but nonetheless I have trouble  
17 articulating the Court's decision. He said it wasn't relevant  
18 to whether a fraud had occurred --

19 JUDGE POOLER: Did the government object?

20 MR. SCHACHTER: The government certainly did object.

21 I was surprised that the government objected to a request to  
22 take testimony and have it presented to the jury of what seems  
23 to be a central witness, particularly when one of the  
24 government's theories is that the defendants were acting  
25 dishonestly in not following the British Bankers Association's

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1 expectations. In fact, that's much of the government's  
2 summation. The government talks about that. How could then  
3 the witness from the British Bankers Association that runs  
4 LIBOR, how could that testimony be denied to this jury? Yes,  
5 the government objected.

6 JUDGE CABRANES: We'll hear from them on that for  
7 sure, and they will want to be thinking about it; but before  
8 you sit down, would you briefly address the Kastigar issue?

9 MR. SCHACHTER: Yes. So what we had, again, by virtue  
10 of the fact that these men were prosecuted in the United  
11 States, in an extremely unusual circumstance. We are aware of  
12 one case where it has ever happened that a witness, a  
13 government witness, has been exposed to a defendant's compelled  
14 testimony. Really, this never happens; never should happen.

15 JUDGE LYNCH: Unless somebody testifies on national  
16 television under an immunity granted by Congress.

17 MR. SCHACHTER: Exactly. It's an extremely rare  
18 circumstance.

19 JUDGE LYNCH: Which has happened, and that's the case  
20 you're referring to, I take it?

21 MR. SCHACHTER: Of course. Yes, your Honor. Yes.

22 JUDGE CABRANES: Poindexter and North, right?

23 MR. SCHACHTER: Yes.

24 JUDGE CABRANES: Unusual.

25 MR. SCHACHTER: It's very unusual. Here, you have a

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1 circumstance where -- I was present, by the way, at Mr. Allen's  
2 U.K. testimony, and I said, I just want to make perfectly clear  
3 that this man has Fifth Amendment rights in the United States,  
4 and so if, God forbid, he's ever prosecuted in the United  
5 States, that no use or derivative use could be made of this  
6 testimony. There can be no exposure -- any exposure by anyone  
7 associated with this prosecution, any witness, would  
8 effectively make him non-prosecutable here in the United  
9 States. I just want to make that clear.

10 And here you had a circumstance where the government's  
11 main cooperating witness, Paul Robson, he testifies one way  
12 before the financial conduct authority. He testifies  
13 effectively that he didn't think he was doing anything wrong.

14 JUDGE CABRANES: During that proceeding in Britain,  
15 was there anybody from the United States Government present?

16 MR. SCHACHTER: No, although they were well aware of  
17 the testimony, I believe, because I believe that I had notified  
18 the Justice Department of the testimony, and I believe that  
19 they speak in their papers of their efforts to wall themselves  
20 off from the testimony so that the prosecutors themselves did  
21 not hear of the testimony, even though they were speaking to  
22 the FSO, I understand, on a pretty regular basis because they  
23 were coordinating the investigation who was going to prosecute  
24 who. There's interactions between the Justice Department and  
25 the FSO, but they walled themselves off from that.

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1                   JUDGE CABRANES: I interrupted you. Go ahead.

2                   MR. SCHACHTER: Mr. Robson testifies one way before  
3                   the FSA. Then it was called the FSA; now the FCA. Then he  
4                   receives Mr. Allen's compelled testimony, which he's forced to  
5                   testify under penalty of imprisonment in the U.K. He reads  
6                   that testimony, and he has obviously read it carefully. We  
7                   attach his markups of the testimony in the appendix. He  
8                   circles, he stars throughout the testimony. And it's not  
9                   surprising that he would pay attention because Mr. Allen was  
10                  Mr. Robson's supervisor, so this is pretty important testimony.

11                  In fact, Mr. Robson had testified that he thought he  
12                  was supposed to be speaking to traders in other countries so  
13                  that he could estimate borrowing costs. And Mr. Allen says  
14                  no -- his testimony before the FCA is, no, he shouldn't be  
15                  looking to other traders in order to set LIBOR. And he stars  
16                  and he circles and he asterisks, and then he writes five pages  
17                  of notes to his attorney about what he read in Mr. Allen's  
18                  testimony and also Mr. Conti who he sits next to. And  
19                  remember, the subject of this testimony is about things that  
20                  happened years ago and these are close coworkers of Mr. Robson,  
21                  so, of course, he pays close attention to the compelled  
22                  testimony, and then he tells a completely different story. We  
23                  detail certain portions of that in our brief. He tells a  
24                  completely different story.

25                  Now, the government has what the courts have referred

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1 to as an extremely heavy burden, and the reason why it's a  
2 heavy burden is they have to prove a negative. They have to  
3 prove that there was no use made; that he made no use  
4 whatsoever. He was not affected. His recollection was not  
5 refreshed. According to the D.C. Circuit, it doesn't even  
6 matter if that witness had personal knowledge of these events  
7 because you still don't know what can affect somebody's --

8 JUDGE LYNCH: To the D.C Circuit, it didn't even  
9 matter that the witness had given on substantive terms the same  
10 testimony to a grand jury before being exposed to Mr. North's  
11 testimony. The normal way that this would be done, that the  
12 government tries to meet this burden in these cases, is to look  
13 back at, if they are fortunate enough to have such a thing or  
14 they took the trouble to make it, at exactly what you're doing:  
15 Look at Robson's testimony before he was exposed to the  
16 immunized testimony, compare it after, and demonstrate that  
17 it's the same thing. But here you're telling us it is in  
18 significant ways not the same thing.

19 MR. SCHACHTER: The canned testimony is completely --  
20 what the D.C. Circuit referred to as the canned testimony which  
21 you could look to, to show theoretically that the witness was  
22 not in any way affected by his review of this testimony, and  
23 the D.C. Circuit's -- memory is a very difficult thing. When  
24 you're asking witnesses to talk about their memory, what could  
25 affect a memory of things that happened years ago, it's hard.

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1       But if you had, the D.C. Circuit theorizes, if you had canned  
2       testimony, and you're able to show the testimony is identical  
3       to the testimony they provided from before exposure to after,  
4       then, then perhaps you could show that this witness was not  
5       affected in any way.

6                  Judge Rakoff in addressing the Kastigar issue that we  
7       raised explicitly stated he is not following the D.C. Circuit's  
8       standard and makes no analysis of what the D.C. Circuit said  
9       was the test, that Mr. Robson was not in any way -- and these  
10      are their words -- shaped, altered or affected; that the  
11      government must prove, they must negate the possibility that  
12      his testimony was refreshed or influenced, and that is a heavy  
13      burden. And it is a burden that Judge Rakoff released the  
14      government from in this circumstance; said that's not the test  
15      he's going to apply, and we believe that was error.

16                  JUDGE LYNCH: This is a rare circumstance, as you say,  
17       and the D.C. Circuit is not us, and we've never confronted this  
18       situation before. Isn't it right that what Judge Rakoff did  
19       was essentially apply a test, almost like what happens to  
20       eyewitnesses in a suggestive identification test situation,  
21       which is to say, since Mr. Robson says he had a good  
22       opportunity to learn this information on his own, since he was  
23       there, presumably, for I think most of the things anyway he's  
24       testifying about, and I credit that he says this is his real  
25       recollection now and it's not really influenced, that's enough?

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1 Isn't that basically what he did?

2 MR. SCHACHTER: I will add one caveat. There is one  
3 additional thing we suggest is relevant that he also looked at;  
4 that is, effectively he credited Mr. Robson's denials. And I  
5 will note this is an issue that this Court has confronted  
6 because in many circumstances the question is whether  
7 prosecutors have been exposed, and this Court has said on  
8 numerous occasions that we're not going to rely on a  
9 prosecutor, an officer of the Court's denials as to exposure.  
10 The government needs to prove more than that. And we suggest,  
11 we argued that certainly if the prosecutor --

12 JUDGE LYNCH: Before you get away from it, what is the  
13 extra thing mentioned to Judge Rakoff?

14 MR. SCHACHTER: The government also assembled a chart  
15 which compared Mr. Robson's testimony to other evidence that  
16 was presented to the jury. So, in other words, Mr. Robson says  
17 this, but so does Mr. Yagami. Mr. Robson says this, but so  
18 does Mr. Stewart.

19 JUDGE POOLER: But they didn't print a chart of his  
20 before and after testimony, did they?

21 MR. SCHACHTER: Absolutely not, because that would  
22 actually address the issue, which is, was Mr. Robson's  
23 testimony in any way shaped, altered or affected. The fact  
24 that Mr. Yagami testified at trial something that's consistent  
25 with Mr. Robson, well, that's not the basis for Mr. Robson's

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1       testimony. He certainly didn't review Mr. Yagami's trial  
2       testimony before testifying at trial.

3                  JUDGE LYNCH: There is one other issue you've got to  
4       get over, right, on the Kastigar issue, which is, say  
5       hypothetically that we agreed with you that if the SEC or the  
6       U.S. Justice Department had given Mr. Robson this transcript  
7       and then Mr. Robson testified. Assume that we agree that that  
8       would be a flagrant violation of Kastigar. How is it changed  
9       or is it changed by the fact that the testimony was compelled  
10      by a foreign government, and under the foreign government's  
11      rules, if they had done this prosecution, they could have done  
12      essentially what the government did here -- I take it that's  
13      the belief -- without consequence.

14                 MR. SCHACHTER: Yes. That is, I believe, simply  
15      wrong. The reason for that -- first of all, I will note that  
16      taken to its logical end, the government would say, well, sure,  
17      Mr. Allen was compelled under penalty of imprisonment in the  
18      U.K. to testify, but we didn't do it, so the Fifth Amendment  
19      doesn't apply. Nothing would prevent them from using it any  
20      way they see fit. In fact, according to the government's  
21      theory, they could introduce it to the jury.

22                 JUDGE LYNCH: They could introduce it to the jury.

23                 MR. SCHACHTER: Sure, let's have Mr. Allen's compelled  
24      testimony presented before the jury under their argument.

25                 JUDGE LYNCH: There might be some due process limits

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1 to this, right? For example, if it was compelled by torture,  
2 the case might be different. Or if it was a more flagrant use  
3 of the testimony, that might be different. But does every jot  
4 and tittle of Fifth Amendment law apply in the circumstance  
5 where a foreign government has done something that could  
6 compromise American prosecutions? Because they're just doing  
7 what they do under their law; they give this witness the  
8 testimony to look at because there's no problem for them to do  
9 that. Now it's happened, and now an important witness is just  
10 unavailable to the United States?

11 MR. SCHACHTER: Well, it's difficult to address  
12 circumstances beyond this one, but here we have the Fifth  
13 Amendment, and the reason why the Fifth Amendment applies here  
14 is the act which violates the Fifth Amendment is the use of the  
15 compelled testimony. It's not the compulsion. The Supreme  
16 Court has made that clear. It is the use of the compelled  
17 testimony. That is when the violation has occurred. It  
18 doesn't matter --

19 JUDGE LYNCH: Which is the Fourth Amendment cases.

20 MR. SCHACHTER: That's correct. But under the Fifth  
21 Amendment, it is the use of the compelled testimony in any way,  
22 a direct derivative that is the Fifth Amendment violation. It  
23 doesn't matter who did the compelling because that is not the  
24 threshold issue. No court has suggested that the Fifth  
25 Amendment does not apply to taking compelled testimony of a

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1 witness who is subsequently prosecuted in the United States.

2 And in fact, the Supreme Court in United States v.

3 Bram. They dealt with this exact circumstance. This was  
4 testimony that was taken in Canada of someone who then is  
5 prosecuted in the United States, and the Supreme Courts -- it's  
6 a long time ago. It's late 1800's; 1898, I believe.

7 JUDGE LYNCH: They were remarkably liberal, the  
8 Supreme Court, in the late 19th century.

9 MR. SCHACHTER: But just as authoritative.

10 JUDGE LYNCH: They made the Warren Court look tough.

11 JUDGE CABRANES: The case has not fallen into  
12 desuetude.

13 MR. SCHACHTER: That's correct. Many courts,  
14 including this Court, some directly, have said that it's  
15 well-settled -- in In Re: Terrorist Bombings, this Court said  
16 "foreign nationals interrogated overseas but tried in the  
17 civilian courts of the United States are protected by the Fifth  
18 Amendment."

19 In Yousef, this Court said, "The law is settled that  
20 statements taken by foreign police in the absence of Miranda  
21 warnings are admissible if voluntary."

22 The Ninth Circuit in Brûlé addressed this case this  
23 circumstance head on because it was statements that had been  
24 compelled by Mexican law enforcement, and the Ninth Circuit  
25 says the Fifth Amendment applies.

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1           There is no case which has ever held that the Fifth  
2       Amendment does not apply to the Justice Department's use of  
3       compelled testimony because the compelling was outside of the  
4       United States. And unlike the Fourth Amendment, this is not a  
5       restriction on government action. It's not like Miranda. It's  
6       not a prophylactic rule.

7           The rule is against the use of the testimony  
8       regardless. It doesn't ask anyone to find fault in the  
9       compulsion. It's not a question of whether or not the Justice  
10      Department is to blame for this testimony. The issue is are  
11      they using it.

12           JUDGE CABRANES: Thank you, Mr. Schachter.

13           MR. SCHACHTER: Thank you.

14           JUDGE CABRANES: Mr. Pellettieri, looking forward to  
15      hearing from you. You might give some thought to the original  
16      inquiry by me at the threshold regarding the history and  
17      timeline of the prosecution itself.

18           MR. PELLETTIERI: May it please the Court, John  
19      Pellettieri from the Department of Justice on behalf of the  
20      United States.

21           Turning to that first, Judge Cabranes, LIBOR was  
22      devised by the British Bankers Association to be an impartial  
23      market tool for use in financial transactions throughout the  
24      world; and it was used, and it is used, in financial  
25      transactions throughout the world, including many in the United

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1 States and in New York.

2 Now, the defendants here also manipulated the U.S.  
3 dollar LIBOR. In fact, they did it with individuals located in  
4 New York in a bank branch located in New York, and Main Justice  
5 as a general matter has been investigating and prosecuting  
6 LIBOR cases and has been handling those and taking the lead on  
7 them. So that is generally the background here.

8 JUDGE POOLER: Are other cases pending on LIBOR?

9 MR. PELLETTIERI: There are other prosecutions  
10 pending, yes, your Honor.

11 JUDGE POOLER: In the Southern District?

12 MR. PELLETTIERI: I believe in Southern District. I'm  
13 not positive off the top of my head, your Honor.

14 JUDGE POOLER: But this was the first to go to trial?

15 MR. PELLETTIERI: This was the first to go to a jury  
16 and lead to a conviction, but there have been deferred  
17 prosecution agreements with the banks, a number of them, and so  
18 those prosecutions have been resolved with Main Justice with  
19 the banks themselves. This was the only one to go to trial so  
20 far and to lead to a jury verdict against individuals.

21 JUDGE POOLER: But the banks who submitted bids, are  
22 those the banks you're talking about? So you've had deferred  
23 prosecutions with other banks?

24 MR. PELLETTIERI: Other banks, your Honor. Rabobank  
25 for one entered into a deferred prosecution agreement and other

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1       banks as well.

2                     JUDGE POOLER: So you have a deferred prosecution with  
3       Rabobank, and yet you're pursuing these two employees of  
4       Rabobank.

5                     MR. PELLETTIERI: Well, they -- they admitted  
6       liability. They admitted guilt, and there's a deferred  
7       prosecution agreement, yes. And we also prosecuted individuals  
8       as well.

9                     Now, turning back to the purpose of LIBOR and its  
10      function. As I mentioned, the British Bankers Association  
11      intended it to be an impartial market tool, and for that reason  
12      they selected a panel of banks based on the reputation, the  
13      scale of activity and the perceived expertise of those things.  
14      And then they required that those banks provide an estimate of  
15      the bank's borrowing costs on the interbank market every day  
16      around 11:00 a.m. London time.

17                    Now, Rabobank required the defendants here, who are  
18      cash traders, to provide that estimate because they had the  
19      expertise. So they were able to evaluate -- and Mr. Allen's  
20      testimony at trial went into this. He described at pages 1165  
21      to 1169 in the trial transcript how he was able to evaluate  
22      market information every day. He had the expertise as a cash  
23      trader, evaluate market information, and get a picture of the  
24      market, get a picture of where cash was trading, and as time  
25      went on, that picture narrowed down to a single number that he

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1 could provide --

2 JUDGE POOLER: A single number or a range of numbers?

3 MR. PELLETTIERI: He said it was a straightforward  
4 process, and I could provide an estimate every day of what the  
5 bank's borrowing costs were. He didn't mention a range or say  
6 I couldn't figure out between one of a number. His testimony  
7 was that I had the expertise, and I could do it, and I did do  
8 it, and he said, yes, I received requests from traders. They  
9 asked me. It was, number one, improper for them to even ask  
10 me, but I just didn't act on those. I kind of pushed them off,  
11 and I gave my honest estimate every day. That was his  
12 testimony.

13 The jury was entitled to reject that testimony, and in  
14 fact, the jury on that testimony alone could have convicted  
15 Mr. Allen, but there was ample evidence supporting that there  
16 was a single number, an estimate that the defendants were able  
17 to come to every day, and that instead of providing that  
18 estimate, they provided something different.

19 They bumped the number, they biased the number, and provided  
20 that biased number with the purpose of benefiting Rabobank  
21 traders, the positions they held in interest rate swaps. Now  
22 these interest rate swaps --

23 JUDGE LYNCH: I may tend to agree with you about that,  
24 what a jury could have found on the evidence in the record, but  
25 it seems to me there is some possibility that the question is

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1       ambiguous; that it could be read the way Mr. Schachter wants it  
2       to be read, and he had a witness from the BBA who would have  
3       testified that that's not what the question meant, that the BBA  
4       would have been satisfied with any estimate -- high, low or in  
5       the middle -- plucked from a range of reasonable guesses.

6                   MR. PELLETTIERI: Well, that wasn't Mr. Ewan's  
7       testimony. I think you have to look at the actual transcript,  
8       which is at Docket 1063 page 8, and if you look at the --

9                   JUDGE LYNCH: Is that in the appendix? I have the  
10      appendix.

11                  MR. PELLETTIERI: I believe it was in the --

12                  JUDGE LYNCH: The transcript?

13                  MR. PELLETTIERI: I will double check for you. Maybe  
14       my colleague will recall it.

15                  JUDGE LYNCH: Just read it then.

16                  MR. PELLETTIERI: What happened was, this was on  
17       cross-examination, Mr. Ewan was presented with a document that  
18       was authored by someone, I believe it was Fred Stern, and in  
19       it, it contained the statement that was quoted in the briefs  
20       and has been quoted to the Court today where it said -- this is  
21       Fred Stern saying, "A contributor panelist who can borrow in  
22       reasonable market size at any one of a wide range of offered  
23       rates commits no falsehood if she bases her response to the  
24       daily LIBOR survey upon the lowest of these or the highest or  
25       any other arbitrary selection." That's what Fred Stern said in

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1       a document.

2                  Then Mr. Ewan was asked, "is that" -- you know, do you  
3 agree? And he said, well, that's fine as far as what Fred  
4 Stern is saying. It's consistent with the definition. Then he  
5 says, "but" and he goes into a whole other explanation. He  
6 says, "But there's a final component of the definition which is  
7 a bank can't submit a range. It has to submit one number. And  
8 so that's why the LIBOR question isn't where did you last  
9 borrow money. In order to arrive at that one, that one number,  
10 the question is where do you think you would be lent money?  
11 And there can be only be one answer to that, and it should be  
12 where do you think an unnamed counterparty would offer you  
13 money?" And he said, "You should be using all information  
14 available to you to get to that one figure."

15                  He said, "Well, was that a funneling process?" He's  
16 asked.

17                  He said, "I don't know if there's a funneling process,  
18 but yes, there should be a process at the bank that lays out  
19 how you arrive at your number and whether it's a funneling down  
20 or an iteration of evidence, or however you want to describe  
21 it, but there should be a process for doing it."

22                  So he says, yes -- and it's consistent with Allen's  
23 testimony. Allen said, "Yes, there was a process. Every  
24 morning I got down to one number."

25                  JUDGE LYNCH: It's a somewhat contradictory answer at

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1       least if he starts by saying yes, Mr. Stern is correct, because  
2       what Mr. Stern apparently says is that any estimate would do.

3                  MR. PELLETTIERI: And then he qualifies it.

4       Initially, I agree, it's somewhat --

5                  JUDGE LYNCH: But then he comes back and says  
6       something else. But does he ever say it would be -- flatly say  
7       it would be wrong, it would be a falsehood to give an estimate  
8       that is influenced by a trader?

9                  MR. PELLETTIERI: Yes, he absolutely said that. He  
10      said that it was against the letter and the spirit of the  
11      definition to take into account a trader's interest in  
12      providing a LIBOR submission. He absolutely said that. He  
13      said, I didn't know about it until 2012. I think he says maybe  
14      there's some inklings in 2012, but I didn't know about it in  
15      2010. I didn't know about it until 2012.

16                 In fact, Mr. Ewan was called as a Crown witness  
17      against an individual who was charged and convicted of  
18      manipulation. He was called to testify that it was not proper,  
19      it was not part of the definition to take trader interest into  
20      account. I didn't know about it, and if I'd known about it, I  
21      wouldn't have approved of it. There was a conviction in that  
22      case.

23                 So Judge Rakoff did not abuse his discretion at all in  
24      concluding that Mr. Ewan's testimony when viewed in its  
25      totality was not material. And, again, there's a different

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1 standard. It's not relevance. It's materiality. In addition  
2 to materiality, there also has to be a showing that it would be  
3 a deprivation of justice if the deposition were not taken. So  
4 depositions are the exception; not the rule.

5 And materiality is different than relevance. There  
6 has to be something that would show a reasonable likelihood  
7 that would actually change the outcome of the trial or affect  
8 the outcome of the trial.

9 In light of everything Mr. Ewan testified to, the fact  
10 that it absolutely was not proper to take into account trader  
11 interest in setting a LIBOR, he didn't know about it, and that  
12 there has to be one number. Mr. Ewan's testimony which  
13 supported our case --

14 JUDGE POOLER: In order to get to the one number,  
15 doesn't he get information from various sources, and isn't that  
16 what we've been calling the range of the one number, the range  
17 of the right number? Isn't that correct?

18 MR. PELLETTIERI: The cash brokers, who were the LIBOR  
19 submitters, had their own expertise just by trading cash, and  
20 then they also collected market information; and among the  
21 market information they collected was information from brokers,  
22 and different brokers may have given different information. So  
23 there was perhaps on any given day different numbers, and the  
24 responsibility of the LIBOR submitter was to take all that  
25 information and provide an estimate. And the evidence

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1       established that they were able to do it, they were able to get  
2       to that number. They were able to get to an estimate, but they  
3       gave a different number. And by giving that different number,  
4       that's deceit. That's deceptive. Because every estimate  
5       provided by the defendants carries with it an assertion that  
6       this is actually my estimate; this is not something else.

7                   JUDGE POOLER: The nature of the fraud is what?

8       Describe the fraud to me. What is the fraud that was  
9       perpetrated?

10          MR. PELLETTIERI: Well, a scheme to defraud is a  
11       scheme to deprive another of property or money through deceit.  
12       And here, the defendants deceptively provided estimates that  
13       were not actually their estimates, so those were misleading and  
14       false, in order to deprive their counterparties in these  
15       interest rate swaps of their money, because, remember, these  
16       interest rate swaps are directly tied to the LIBOR. If in this  
17       interest rate swap a counterparty agreed I'm going to pay the  
18       floating rate LIBOR on this notional amount of 10 million, if  
19       LIBOR goes up, the counterparty automatically has to pay more  
20       money to Rabobank. And so by scheming and deceptively changing  
21       that number, that --

22          JUDGE POOLER: Even marginally.

23          MR. PELLETTIERI: Even marginally, because many of  
24       these were billions of dollars, many hundreds of millions of  
25       dollars. Even marginally affects and deprives the counterparty

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1       of money or property. So that was the scheme. The whole  
2       purpose of the scheme was to profit, to maximize Rabobank's  
3       profits in these interest rate swaps.

4                  JUDGE POOLER: Can I turn a moment to the ten-year  
5       statute of limitations that you need to show a harm, as we were  
6       just talking, to an FDIC bank, correct? The charge that Judge  
7       Rakoff gave added that the "investment decisions of that bank  
8       would have been different if the bank had known of the fraud."

9                  Now, that's not anywhere in this statute. As far as I  
10      can tell, that was made up. It may be correct, but it was made  
11      up. I believe the defendants objected strenuously to that  
12      language, and yet it was delivered to the jury. Can you speak  
13      to that?

14                 MR. PELLETTIERI: A few points. So, the statute uses  
15      the word affect. And everyone agrees, the defendants agree  
16      that an affect on a bank includes exposing that bank to loss or  
17      a risk of loss. Now, loss and risk of loss --

18                 JUDGE POOLER: He said risk of loss, but then he added  
19      "or" so he gave an alternative ground, and there was no special  
20      verdict, so we don't know on which ground the jury decided.  
21      "Or that the investment decisions of that bank would have been  
22      different if the bank had known of the fraud." And that's not  
23      in the statute, is it?

24                 MR. PELLETTIERI: No, and neither is loss or risk of  
25      loss. It gives explanation for the word affect. And in our

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1 view, an influence on a bank's investment decision is an effect  
2 on that bank. It does affect that bank. In fact, there's very  
3 little difference between affecting a bank's investment  
4 decision and exposing the bank to a risk of loss because  
5 investment decisions are intended to maximize profit and reduce  
6 risk of loss.

7 JUDGE POOLER: You didn't submit this language either.

8 MR. PELLETTIERI: No, we did not submit it. We didn't  
9 rely on it in our argument at all. But a few points. Number  
10 one is, this is not a jury question under this Court's  
11 precedent. It was submitted to the jury, but it didn't have to  
12 be.

13 JUDGE POOLER: Under the statute, the judge could have  
14 decided by himself?

15 MR. PELLETTIERI: Well, this Court has held that in  
16 the statute that tolls the limitations period for a period  
17 where the defendant is a fugitive from justice, it is the  
18 district court that finds by a preponderance of the evidence  
19 whether the defendant was a fugitive and tolls that period. We  
20 don't see any way of distinguishing that determination from the  
21 determination of whether a fraud affects a bank.

22 JUDGE POOLER: You needed the fraud to affect the bank  
23 to get the ten-year statute to make all these cases within the  
24 statute of limitations. Isn't that correct?

25 MR. PELLETTIERI: For the substantive wire fraud, not

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1 for the conspiracy counts. Because an objective of the  
2 conspiracy counts was bank fraud, that carried a ten-year  
3 statute of limitations of already.

4 JUDGE POOLER: If the convictions were based on all  
5 the overt acts of the wire fraud, it would have been harder to  
6 prove conspiracy without the overt acts. Isn't that correct?

7 MR. PELLETTIERI: Well, a statute of limitations is an  
8 affirmative defense. It needs to be pressed by the defendants  
9 at the trial. There was never any assertion of a statute of  
10 limitations to the conspiracy counts here. So it's waived.  
11 That's the Musacchio case in the Supreme Court just recently  
12 decided. The reason for that is because perhaps we would have  
13 presented different evidence to show whatever had to be  
14 demonstrated.

15 JUDGE POOLER: They argue it now, I suppose we would  
16 look at it as a harmless error standard, but I think they argue  
17 now that the ten-year statute shouldn't have applied.

18 MR. PELLETTIERI: For the conspiracy, it wouldn't be  
19 plain error, harmless error. It's waived. But for the  
20 substantive wire fraud counts, the first question is whether  
21 the instructions were erroneous. We don't think they are, but  
22 if they were, the Court would then determine whether it is  
23 harmless error. In our view it is harmless error because of  
24 the overwhelming evidence of a risk of loss to these banks, to  
25 these FDIC-insured banks. These banks were the object of the

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1       fraud. They were the counterparties in these swaps, and the  
2       purpose of the fraud was to deprive those counterparties of  
3       money.

4                     JUDGE POOLER: So you have no problem with risk of  
5       loss.

6                     MR. PELLETTIERI: Absolutely no problem with risk of  
7       loss. It's clear that, as this Court has said, if a bank was  
8       the object of the fraud, it clearly was affected; and we proved  
9       that these banks were the object of the fraud, and by being an  
10      object were supposed to a risk of loss.

11                  JUDGE POOLER: You didn't really need the second  
12      phrase in that charge which says "or that the investment  
13      decisions of that bank would have been different if the bank  
14      had known of the fraud." You really don't need that. All you  
15      needed is the risk of loss.

16                  MR. PELLETTIERI: Right, your Honor. We don't need  
17      it.

18                  JUDGE POOLER: So it was surplusage, and yet there was  
19      no special verdict, the jury could have found on that basis.

20                  MR. PELLETTIERI: It wasn't surplusage. It was  
21      explicating the word affect. So, as this Court has said,  
22      affect encompasses a broad range of influences. It's not  
23      limited to a particular loss or risk of loss in the language of  
24      the statute. It talks about effect.

25                  JUDGE POOLER: He was just elaborating on what risk of

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1 loss is.

2 MR. PELLETTIERI: Well, no, he's elaborating on  
3 effect. Risk of loss elaborates on effect, and changing the  
4 bank's investment decision elaborates on effect.

5 JUDGE POOLER: I was only troubled that neither party  
6 asked for that language and the defendants objected, and yet it  
7 was given to the jury. That was my concern.

8 MR. PELLETTIERI: Well, in our view it was consistent  
9 with the language of the statute. The jury didn't even have to  
10 make that determination because it was a determination of the  
11 judge, and any error in the instructions was harmless because  
12 there was ample evidence of risk of loss to these banks.

13 JUDGE LYNCH: Can we go back to the jury instructions  
14 on the theory of mail fraud for a moment? It is clear from  
15 some of my questions that I tend to agree with you that if  
16 there was not an honest answer given, that's clearly a mail  
17 fraud; but the defense actually requested an instruction that  
18 seems to me to be entirely consistent with your theory, and at  
19 least what I'm inclined to think, they asked for an instruction that  
20 that "a statement of opinion or estimate may constitute a false  
21 statement or misrepresentation only if the government can prove  
22 beyond a reasonable doubt it was not honestly held by the  
23 person making it at the time that it was made."

24 Isn't that an exact accurate statement of law and  
25 indeed a statement of what your theory was; that they didn't

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1 give an honest estimate at the time that it was made?

2 MR. PELLETTIERI: I think the only word we would  
3 quibble with is "only," but yes, it was generally an accurate  
4 statement, but the Court correctly concluded that that concept  
5 was already incorporated into --

6 JUDGE LYNCH: Where? Can you just point me to what  
7 the judge said that conveys that piece of law?

8 MR. PELLETTIERI: Yes. To begin with, the broader  
9 instruction where the Court said that "the government had to  
10 prove a plan or design to obtain money or property by means of  
11 false or fraudulent pretenses, representations or promises  
12 which can take the form of outright lies but can also consist  
13 of misleading half-truths." So that encompasses the general  
14 framework; and as we discussed, when someone gives an estimate  
15 that is not an actual estimate, that is a lie. So as a broad  
16 matter, that is in there.

17 JUDGE LYNCH: To be very specific though, in a case  
18 where the whole point according to the government is that the  
19 defendants did not -- maybe I'm misunderstanding your theory.  
20 I thought your theory was precisely that this was a fraud  
21 because the defendants did not give their honest estimate.

22 MR. PELLETTIERI: So that provides the background, but  
23 there's more specific --

24 JUDGE CABRANES: In reference to Judge Rakoff's  
25 instruction, do you have a page citation for it? You seem to

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1       be reading from it.

2                   MR. PELLETTIERI: Yes. It's in the trial transcript  
3       at 1631 to 1633, I believe, or 1634 are the elements of wire  
4       fraud. So that's where that is. Also, again, the general  
5       instruction about falsehood, lies, things of that sort.

6                   Then that has to be understood together with the  
7       good-faith instruction which says, "A statement made with a  
8       good-faith belief in its accuracy does not amount to an  
9       intentional false or misleading statement and is not a crime  
10      even if the statement itself is accurate or misleading."

11                  So that encompasses the idea that if they felt their  
12      estimate was somehow accurate, if they believed that, they  
13      wouldn't be convicted.

14                  Now, to go further, the Court also explained the  
15      government's allegations, and when he explained the  
16      government's allegations, he said, "The government alleges that  
17      the defendants submitted LIBOR or rate estimates that were not  
18      at the levels the defendants would have honestly submitted  
19      otherwise, but were instead at levels reflecting, at least in  
20      part, an intent to benefit Rabobank's trading positions."

21                  So, under that theory if the defendants gave an honest  
22      estimate that's different than their -- so that that  
23      encompasses the idea if they thought all three were perfectly  
24      appropriate, then they wouldn't have been guilty.

25                  Now, fourth, there's another component of the

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1       good-faith instruction where the Judge says, "If a defendant  
2       believed in good faith that he was acting properly in making  
3       such a statement or causing it to be made, even if he was  
4       mistaken in that belief and even if others were injured by his  
5       conduct, there would be no crime." So this was a very defense  
6       friendly good-faith instruction.

7                 And Mr. Conti made a pitch about a range -- Mr. Allen  
8       didn't, but Mr. Conti made this pitch in closing arguments. He  
9       said, look, my client thought every day there may be a few  
10      numbers that he thought accurately described Rabobank's  
11      borrowing costs, and he didn't think there was anything wrong  
12      with providing a number based on trader interest. Now, if the  
13      jury accepted that, the jury would have acquitted under these  
14      instructions.

15               JUDGE POOLER: Counsel, in an exchange with  
16      Mr. Yagami, Mr. Robson said, "Don't worry, mate. There's  
17      bigger crooks in the market than us."

18               Do you have more cases that you're going to bring  
19      based on the fact that, I guess, everyone was a crook in doing  
20      this?

21               MR. PELLETTIERI: These investigations and  
22      prosecutions continue, yes, your Honor.

23               Now, just turning to some of the strength of the  
24      evidence of this range and the fact that they didn't believe  
25      it. There's two issues here. One is sufficiency of the

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1 evidence and one is the jury instructions.

2 I just described how the jury instructions allowed or  
3 required acquittal if the jury found the facts as described in  
4 Mr. Conti's closing statement. But the facts didn't establish  
5 that; far from it. The facts established the opposite. We  
6 provided really very substantial evidence that showed that the  
7 defendants did, in fact, collect market information, come to a  
8 figure that represented their estimate, and then change that  
9 figure and provided that figure instead of their actual  
10 estimate in order to bump up or bump down the LIBOR and benefit  
11 the traders.

12 I think that some of the best evidence are the  
13 collection of emails between the government supplemental  
14 appendix 14 through 17. And in that exchange Christian Schleup  
15 from New York asks Conti, "Where do you see the six-month LIBOR  
16 tomorrow?"

17 And Conti says, "Where do you like to see it is more  
18 the question."

19 Later in the exchange, he says, "Well, at the moment,  
20 5.40."

21 Then later in the day, Schluem texts Conti and says,  
22 "Gonna need a fricking high six-month fix tomorrow if OK with  
23 you. 5.42?"

24 Conti says, "Remind me tomorrow. I have too much on  
25 my plate right now."

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1                   So tomorrow Schluep obliges and says, "Don't want you  
2 to price yourself out of the market. A 41, 42 level would be  
3 great though."

4                   Then there's another exchange between Sliney, who is  
5 another New York trader, and Mr. Allen. And Sliney asks Allen,  
6 "Any feel for the LIBORs today?" This is the date when the  
7 other trader had asked Conti can you bump it to 42?

8                   And Allen says, "Well, one, two, three months are 59,  
9 56, 53.5," and he says, "six month, 42 -- six month, 42. I  
10 think that's what Christian needs," Schluep.

11                  So Christian Schluep made the request at 5.42 to  
12 Conti. Allen was aware of it. They provided 5.42 because  
13 that's what Christian needs, not because it was some reasonable  
14 number we thought it was. It was the actual number, and we  
15 changed what we actually would have given.

16                  There's another exchange with Mr. Conti in which he  
17 similarly describes a number 5.20. This is at GSA 100. He  
18 says that it was not specifically correct. He says, "Today's  
19 LIBOR was 5.20." That was not specifically correct. It was  
20 too high. And he says, "Well, even though I gave 5.20 as well,  
21 just because Lee had a fixing." That's Lee Stewart, the trader  
22 who sits across the desk from Conti. So all of this evidence  
23 firmly established that there was one number that represented  
24 their estimate, and they gave a different number.

25                  Regarding the Kastigar issue, there's a factual and a

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1       legal question there, both of which support the district  
2       court's determination. Legally, a Fifth Amendment claim  
3       requires both compulsion and use of the compiled statement.  
4       The compulsion and the use have to be accomplished by a  
5       sovereign bound by the Fifth Amendment.

6                  JUDGE POOLER: Why wasn't the use showing the tomorrow  
7       to Mr. Robson? Isn't that use?

8                  MR. PELLETTIERI: Well, factually, that was not use,  
9       and that's what the district court concluded. I can go into  
10      that.

11                 JUDGE POOLER: Well, is the district court correct?  
12      That's my question.

13                 MR. PELLETTIERI: Yes, I'll turn to that.

14                 JUDGE POOLER: It seems to me it was use if someone  
15      gets to look at it and change their testimony; that's use.

16                 MR. PELLETTIERI: Well, if the exposure to the  
17      compelled testimony is the reason for the change in the  
18      testimony, that is the use. But here, we established that the  
19      changes in Robson's testimony to the FCA in the UK and his  
20      trial testimony in the United States had nothing to do with his  
21      exposure to these transcripts.

22                 He plainly described, he said, yeah, I was fabricating  
23      things in the U.K. I was just trying to prevent market color  
24      because I was just trying to exculpate myself, and I was lying.  
25      Right? Then he comes and he decides, now I'm going to come

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1        clean, and I'm going to testify in the United States  
2        truthfully.

3                  JUDGE POOLER: He says the first time he was lying.  
4        Then he looked at the transcripts. And now, lo and behold,  
5        he's telling the truth.

6                  MR. PELLETTIERI: Well, looking at the transcripts did  
7        not in any way result in his actual truthful testimony.

8                  JUDGE LYNCH: But he says --

9                  MR. PELLETTIERI: Yes, your Honor.

10                 JUDGE LYNCH: And it's enough for the judge in your  
11        view to credit what he said, and then that solves your Kastigar  
12        problem?

13                 MR. PELLETTIERI: We do believe that it's enough, but  
14        that's not the only component here. We do believe that if  
15        there's credible testimony, and that's what the Court in the  
16        D.C. Circuit in Poindexter says was missing there. If you have  
17        credible testimony from a witness that his actual testimony was  
18        not influenced by exposure to tainted testimony, that can  
19        satisfy the government's Kastigar burden.

20                 But we didn't only have that here. We had more.  
21        Number one, we looked at the overlap between the subject  
22        matter, and the D.C. Circuit recently in the Slough case said  
23        applying its own standards in the North/Poindexter cases, it  
24        said, if a person who is exposed to tainted testimony, if their  
25        current testimony has no antecedent in that compelled

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1       testimony, generally that's not enough to show use. There's  
2       not going to be use there. And that was the Slough case. So  
3       if you compare --

4                     JUDGE LYNCH: Wait a minute. So if you have a witness  
5       who gives an account before he's exposed to tainted immunized  
6       testimony that leaves out some significant details, he's  
7       exposed to the testimony immunized testimony that contains  
8       those details and then he testifies at a trial including those  
9       details, it's just a question of his credibility for the  
10      district court? I'm sorry, I must have missed it.

11                  MR. PELLETTIERI: That's not what we're saying. What  
12      we're saying is Mr. Allen's and Mr. Conti's testimony said X,  
13      Y, Z, and Robson's testimony may have been A, B, X. So for the  
14      A and B, there's no use.

15                  JUDGE LYNCH: The A and B is fine.

16                  MR. PELLETTIERI: So that was one additional --

17                  JUDGE LYNCH: But the question is the X.

18                  MR. PELLETTIERI: Yes.

19                  JUDGE LYNCH: The question is, this is not a case  
20      where there's canned testimony that you can go back to and say,  
21      Robson essentially told the same story on every material point  
22      in the pre-exposure testimony to the post exposure testimony.

23                  Instead, am I wrong about this, there are at least  
24      some significant issues on which either Robson testifies to  
25      something that he had never talked about before but that is in

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1       the immunized testimony, or in which he actually said something  
2       different for whatever reason before seeing the immunized  
3       testimony, and then changes his tune after to accord with the  
4       immunized testimony? Is that not a factual statement about at  
5       least some of Robson's testimony?

6            MR. PELLETTIERI: Where there's overlap, the Court has  
7       to determine whether the testimony from Robson was in any way  
8       affected, and that's what the Court made --

9            JUDGE LYNCH: But that's a rather extraordinary thing  
10      to say it's just a question of -- a judge can just say, hey, I  
11      believe him; he has an honest face, it's fine. How is that  
12      meeting a heavy burden to establish that there is no influence  
13      of the testimony? I mean, I have a passing familiarity with  
14      the North case. In North, the D.C. Circuit said, you know,  
15      even if they said the same factual thing before that they said  
16      after, the possibility that they testified more forcefully  
17      because they now knew that North wasn't going to contradict  
18      them or, more emphatically, because they thought that North was  
19      going to call them a liar, that is enough to change to be a use  
20      of the testimony.

21           MR. PELLETTIERI: I think in North factually there  
22      wasn't a dispute whether it had refreshed their recollection,  
23      and the issue was a legal issue whether refreshing recollection  
24      was actually use, and the Court determined that it was actual  
25      use. And here, they didn't try and they didn't show; and we

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1 proved to the contrary, there was no refreshing of  
2 recollection. There was nothing, and for a few different  
3 reasons --

4 JUDGE LYNCH: This seems to me this opens an enormous  
5 door for the government to make use of immunized testimony. It  
6 might be a risk, but it seems to me you're saying there's  
7 nothing that really prevents a prosecutor from giving a witness  
8 the transcript because afterwards if he says, oh, well, my  
9 recollection was independently refreshed by something else --

10 MR. PELLETTIERI: Every case is going to turn on the  
11 facts. I mean, the Slough case in the D.C. Circuit, those  
12 witnesses were exposed to testimony, and the Court concluded  
13 based on the unique facts there that that didn't kick in  
14 Kastigar.

15 And here, it's not just Robson's word. They had  
16 ample, ample opportunity to cross-examine Robson with any kind  
17 of inconsistencies, and the Court observed him. The Court  
18 listened to all of those arguments. The district court was in  
19 the best position to evaluate.

20 But we're not only relying on Robson's say-so. As I  
21 mentioned, what the Court took into account as well are the  
22 testimony of other witnesses and other documentary testimony  
23 that showed --

24 JUDGE LYNCH: You've got one cooperator who is  
25 vulnerable to all kinds of impeachment because he's cooperating

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1       with the government in exchange for a benefit. You bring in  
2       another cooperator who's been exposed to immunized testimony,  
3       and you say, oh, there's no problem because he matches up with  
4       the first cooperator.

5                    MR. PELLETTIERI: The reason the district court took  
6       that into account is to corroborate Robson's testimony that he  
7       actually saw, and that was the basis for his testimony, because  
8       there were other witnesses.

9                    JUDGE LYNCH: But he may have actually seen it, but  
10      we've got a record in which he didn't testify to it until after  
11      he had been exposed to the immunized testimony.

12                  MR. PELLETTIERI: We have Robson's testimony. We have  
13      the corroboration. We also have the fact that much of the  
14      testimony from Allen and Conti consisted of kind of vague  
15      denials, a lack of recollection and really nothing to use,  
16      nothing to prompt the memory, to change or in any way affect  
17      Robson's testimony. Cumulatively, all of that amply met our  
18      burden under Kastigar, but we don't think we had to meet our  
19      burden under Kastigar. We only did it out of an abundance of  
20      caution because there was no compulsion. There was no  
21      compulsion by a sovereign bound by the Fifth Amendment.

22                  JUDGE LYNCH: Well, if that's true, then it would have  
23      been OK, would it not, for you to introduce the transcript of  
24      Conti's testimony at this trial. You didn't do that.

25                  MR. PELLETTIERI: Under the Fifth Amendment. But we

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1       were being cautious, your Honor.

2                     JUDGE LYNCH: I understand you were being cautious,  
3       but you may not be cautious the next time because you're asking  
4       us to hold that it would be permissible for you to do that  
5       because since you weren't the ones who compelled the testimony  
6       in the first place, there's no bar to your use of that  
7       immunized foreign testimony at a trial, any kind of use. The  
8       whole Kastigar hearing was a waste of time on that theory  
9       because even if Robson had been refreshed by the testimony,  
10      that wouldn't be a problem. Even if you had given him the  
11      transcript in order to refresh his recollection, that wouldn't  
12      be a problem. And even if you introduced the testimony at the  
13      trial itself, that wouldn't have been a problem either.

14                  MR. PELLETTIERI: Under the Fifth Amendment -- if the  
15      government as an employer tells a witness, tells an employee,  
16      look, we want information, you've got to testify or we're going  
17      to fire you, if the government does that, that's compulsion  
18      under the Fifth Amendment. We can't use that at a trial.

19                  Now, if a private employer does the same and it says,  
20      well, we're going to fire you unless you provide information,  
21      that doesn't kick in the Fifth Amendment protection. That can  
22      be introduced at a later trial. And the British government is  
23      on the same footing as a private employer. The Fifth Amendment  
24      has to be --

25                  JUDGE CABRANES: Who said that? What court has

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1       supported the proposition that a British government is on the  
2       same footing as a private employer?

3            MR. PELLETTIERI: Well, Judge Friendly ruled that a  
4       private employer like the New York Stock Exchange, if they  
5       compel testimony, that doesn't trigger the Fifth Amendment.

6            JUDGE CABRANES: What's that got to do with a foreign  
7       sovereign?

8            MR. PELLETTIERI: Because if the United States compels  
9       testimony as an employer, that triggers it. And if you make  
10      that distinction between private employer and a public  
11      employer, there's no reason -- the reason is because the  
12      private employer is not bound by the Fifth Amendment, just as  
13      the U.K. government --

14           JUDGE CABRANES: Yes, and you earlier, in response to  
15      Judge Lynch, suggested that compulsion and use had to be by the  
16      same sovereign. That seems to be in direct conflict with our  
17      decisions in Yousef and In Re: Terrorist Bombings. And I was  
18      just scanning your brief in response to defense counsel with  
19      respect to those cases, and I think it's the case that you are  
20      suggesting that those passages of Yousef and In Re: Terrorist  
21      Bombings were dicta. Is that right?

22           MR. PELLETTIERI: Well, they weren't necessary to the  
23      result the way we read those cases.

24           JUDGE CABRANES: It's called dicta.

25           MR. PELLETTIERI: Yes. And the reason is also because

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1       Salameh is really more on all fours here. In that case, you  
2       had an individual who was in foreign custody, was allegedly  
3       compelled -- there's coercive activity by that foreign entity,  
4       and then he was put into United States custody and provided  
5       statements, and this Court held that because of the coercive  
6       activity was allegedly perpetrated by a foreign sovereign, that  
7       didn't kick in the due process protections for a coercion. And  
8       now there's a distinction between this notion of due process --

9                   JUDGE CABRANES: Salameh, with which we're all kind of  
10      familiar, it's an important case in this circuit, but it does  
11      antedate the two decisions that we were just talking about.  
12      I'm not suggesting that there was some modification of the law  
13      of the Circuit, but I would think that the more recent  
14      decisions are more compelling on some of these principles, but  
15      I guess you don't agree with that.

16                  MR. PELLETTIERI: Well, I don't think that in the -- I  
17      don't think that in the Yousef and the Terrorist Bombings case  
18      that the issue that turned on the Court's decision was whether  
19      there was coercion by a foreign government that resulted in  
20      testimony used in the United States. That just wasn't an issue  
21      there as far, as I read those cases. And the Court did hold  
22      that the Miranda rights --

23                  JUDGE CABRANES: I wonder why the Court would have  
24      carried on about that subject if it wasn't an issue.

25                  MR. PELLETTIERI: The Court did hold that Miranda

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1       rights and the requirement that someone be read warnings before  
2       their testimony can be used, that that's a prophylactic rule  
3       intended to protect Fifth Amendment rights, the privilege  
4       against self-incrimination, and it doesn't kick in when foreign  
5       authorities question an individual. If a foreign authority  
6       questions --

7                  JUDGE CABRANES: Your theory, of course, is taking us  
8       to the proposition suggested earlier by Judge Lynch, that if a  
9       foreign sovereign beats the hell out of somebody and compels  
10      the testimony, since it's a different sovereign, you're able to  
11      use that compelled testimony in a federal court.

12                 MR. PELLETTIERI: Well, there might be other  
13      constitutional doctrines that kick in there. We acknowledge  
14      that --

15                 JUDGE CABRANES: It's not a Fifth Amendment issue.

16                 MR. PELLETTIERI: It's not a Fifth Amendment issue,  
17      no.

18                 JUDGE LYNCH: If they don't beat somebody, but they  
19       simply compel him by force of legal compulsion that's legal in  
20       that country to do, in that event, I assume that wouldn't shock  
21       anybody's conscience to follow that, since it's not necessarily  
22       a due process question. You're saying as a matter of Fifth  
23       Amendment law anyway, that's perfectly OK for you -- you are  
24       overly cautious here because you absolutely could have  
25       introduced Allen's and Conti's testimony on your theory.

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1                   MR. PELLETTIERI: Correct, your Honor. And out of an  
2 abundance of caution we didn't, and we also showed factually we  
3 did not use it, and the district court's determinations are not  
4 clearer in light of the record, their really meticulous  
5 evaluation --

6                   JUDGE CABRANES: Let me ask you, our standard of  
7 review of that decision is clearer.

8                   MR. PELLETTIERI: Yes, your Honor, clearer.

9                   JUDGE CABRANES: Anything else you'd like to add?

10                  MR. PELLETTIERI: Unless the Court has any questions,  
11 we would ask that the Court affirm. Thank you, your Honor.

12                  MR. SCHACHTER: I would like to begin with something  
13 that the government says here and said in the indictment but  
14 did not say to the jury. The government here said that the  
15 evidence showed that their estimates were not their estimates.  
16 They also said that they came up with one number and gave a  
17 different number. That would fall within what is established  
18 law with respect to fraud based on statements of opinions or  
19 estimates. They have to prove beyond a reasonable doubt that  
20 it was not honestly held by the person making it at the time.  
21 It was disbelieved by the speaker. That is the theory that the  
22 government articulated in the indictment.

23                  JUDGE LYNCH: Isn't it a reasonable inference from the  
24 kinds of conversation that Mr. Pellettieri read to us that if  
25 Schleup says to Conti, you know, what do you think the number

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1       is going to be? And Conti says, the real question is what do  
2       you want it to be? Why couldn't a reasonable jury draw the  
3       inference beyond a reasonable doubt that Conti wasn't  
4       interested in making an honest estimate. He was interested in  
5       doing whatever Schleup wanted, or at least whatever Schleup  
6       wanted that wasn't so ridiculous that they'd be laughed at and  
7       people would start to suspect something was wrong. Why is that  
8       not a plausible inference?

9                    MR. SCHACHTER: There is no question that swap traders  
10      made requests. They would say, hey, can you put it higher or  
11      lower? And there is no question that the cash traders would  
12      say sure. That does not prove a violation of the wire fraud  
13      statute because the government has an obligation to prove that  
14      the ultimate statement that the speaker made was disbelieved by  
15      him at the time.

16                  JUDGE LYNCH: But that can be a matter of inference.  
17      We're always trying to draw inferences about what's in  
18      somebody's head. It seems to me if somebody says to another  
19      person: What I'm interested in is just what do you want.  
20      That's all I want to know. That's what I care about. Then he  
21      gives the estimate that Schleup asked for, and there's no other  
22      evidence suggesting that there was some calculation that  
23      reached that number, why can't it -- it's a matter of inference  
24      whether Mr. Conti in this case didn't believe what he said.

25                  MR. SCHACHTER: Here, it would be based entirely on

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1 speculation because that's not what the government told the  
2 jury they needed to determine. Again, that was the theory  
3 articulated in the indictment. It said that they submitted  
4 rates that were inconsistent with what they perceived to be the  
5 rate.

6 Comes time for the charge conference, and Judge Rakoff  
7 says that the Court is going to describe the charges in this  
8 other way that doesn't speak to it being inconsistent with the  
9 opinion that the speaker actually had, and instead comes up  
10 with the formulation that they submitted a LIBOR rate that was  
11 different than they otherwise would have to help their  
12 employer. Different, however, does not equal false.

13 And we said, your Honor, if you're going to describe  
14 the indictment, why not use the language of the indictment?  
15 And we asked the Court to include just that language.

16 JUDGE LYNCH: That might have been better for the  
17 judge to do, but still, he does give the good faith  
18 instruction, right? That if the person believed in good faith  
19 that what he was doing was submitting the right estimate, he's  
20 fine.

21 MR. SCHACHTER: The problem with the good faith  
22 instruction -- there's a number of problems with the good faith  
23 instruction. Principally, the good faith instruction tells a  
24 jury: Here's the circumstances where a statement may not  
25 amount to a false or misleading statement. The problem was, it

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1       was academic to the determination that the jury was told by the  
2       Court and by the prosecutors in summation that they needed to  
3       make because they didn't need to consider whether a statement  
4       was false. Then the good faith instruction would have been a  
5       useful tool for them.

6                  But that's not what they were asked to determine.  
7       Judge Rakoff said that the crime, the issue that you need to  
8       determine, jury, is, was it different? Was it influenced in  
9       part by what would help their employer? And these words are  
10      really important. The prosecutors in summation said, if you  
11      find that the defendants took part in the scheme to base  
12      Rabobank's LIBOR submissions, at least in part, on trading  
13      positions, you convict. Regardless of whether they're inside  
14      or outside of the range, you should convict. So, in other  
15      words, the jury --

16                  JUDGE LYNCH: Stay away from the range, right?

17       Whether or not it's what they honestly believed.

18                  MR. SCHACHTER: Yes. Yes. Whether or not it's what  
19       they -- exactly. That's the problem.

20                  JUDGE LYNCH: The words "whether or not they honestly  
21       believed" are not there. It seems to me that what Mr. Ewan's  
22       testimony, at least as the part that Mr. Pellettieri quotes,  
23       says he would have thought that that was not what they're  
24       supposed to do. They're supposed to give their honest  
25       estimate; not what they wish it would be for their own trading

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1 positions.

2 MR. SCHACHTER: I'm going to answer that question in  
3 two ways. First, perhaps one could say that's unethical. That  
4 is a sharp practice. Wire fraud does not embrace everything  
5 that one wishes to consider to be a sharp practice. But I said  
6 two ways, there's two ways; and that is, that it was not clear  
7 even to the government's own cooperating witnesses that there  
8 was anything inappropriate with "as long as you are submitting  
9 a rate that is within the range, that it's a fair and  
10 reasonable estimate," it was not clear to them that that was  
11 unlawful. And it's really important, I found it somewhat  
12 shocking. I'm not sure how his plea was taken, but Mr. Stewart  
13 testified -- and this is the appendix at page 214 -- that in  
14 his view it was, and I'm quoting, "not considered inappropriate  
15 for swap traders to ask the people submitting LIBOR for a  
16 higher or lower rate." This is the government's cooperating  
17 witness' testimony. At trial he testifies that when he left  
18 the bank a year later, he had "no inkling that LIBOR  
19 submissions at Rabobank were an issue or a problem." That's  
20 the government's own cooperating witness who ultimately pled  
21 guilty pursuant to a cooperation agreement.

22 The other cooperating witness says the same thing.  
23 Mr. Yagami testified, page 265 of the joint appendix -- this is  
24 the government cooperating witnesses' testimony.

25 JUDGE CABRANES: What page was that?

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1                   MR. SCHACHTER: 265 of the appendix. I apologize  
2 because we submitted appendices with four pages, which I  
3 realized after submitting was not particularly helpful to the  
4 Court, but it can be found on page 265 of the appendix.

5 Mr. Yagami testified, "The practice of adjusting submissions by  
6 a few basis points based on a trader's request was a gray area  
7 but 'agreeable' and 'OK to do.'"

8                   He even testified about a conversation that he had  
9 with Mr. Robson -- a contemporaneous conversation before he was  
10 threatened with indictment and ultimately pleads guilty.

11                  Mr. Yagami testified the same page of the appendix that  
12 Mr. Robson said, "That it was OK because LIBOR moves in a range  
13 and there were multiple correct LIBOR rates he could submit."

14                  JUDGE POOLER: Excuse me, because opposing counsel  
15 said there was only one rate, not a range. There was only one  
16 rate that was correct. That's what he just said on the podium.

17                  MR. SCHACHTER: Well, there is nothing that supports  
18 that. I think what -- I think what counsel from the government  
19 said is he was quoting language from Mr. Ewan that said there's  
20 only one rate that can be submitted. Yeah, of course,  
21 ultimately, you may have a range of equally accurate estimates,  
22 but ultimately you have to submit one.

23                  JUDGE POOLER: He said there was one rate that was the  
24 right rate.

25                  MR. SCHACHTER: That is completely contradicted by the

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1 evidence at trial. There is nothing in the record which  
2 suggests that there was one rate.

3 JUDGE CABRANES: I suppose, in part, because there are  
4 15 plus banks which are making their own estimates of what the  
5 correct rates are.

6 MR. SCHACHTER: And there is no interbank borrowing  
7 during most of this time period and certainly for most of the  
8 time periods they have to submit LIBOR for, what would they  
9 have to pay to borrow for eight months? There can't be one  
10 number. It never happens. It's, at best, a rough estimate.  
11 The contemporaneous testimony from the communications is, I  
12 don't know, it's between, you know, 3.1 and 3.2, I could -- I  
13 could put it in anywhere.

14 In fact, just to address that, when the government  
15 points to the evidence of he mentioned a number 5.20, which  
16 Mr. Conti puts in LIBOR that day at 5.20, that's final LIBOR  
17 that day. Final LIBOR is 5.20. Rabobank put in 5.20, which  
18 means that the final LIBOR is you have 16 panel banks that each  
19 submit their estimates. And the BBA lops off the top four,  
20 lops off the bottom four, averages the middle eight, and  
21 Mr. Conti's submission that day, 5.20, was exactly the same as  
22 the average of the middle eight banks. That can't be fraud.

23 JUDGE LYNCH: Unless Mr. Conti thought it was 5.18,  
24 and if he put that in, it might have come out at 5.19 as the  
25 total average.

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1                   MR. SCHACHTER: I agree with your Honor one hundred  
2 percent. And had the jury been instructed that that's what  
3 they need to find -- had they been instructed, as we asked, on  
4 how they should assess an opinion or estimate, and they have to  
5 find that the opinion or estimate provided was disbelieved by  
6 the speaker, had Judge Rakoff and the government told them  
7 that's the test, maybe it wouldn't be an issue.

8                   And the reason why the Court and the government  
9 instructed the jury in this fashion was because it was the end  
10 of the trial, and the government had not presented any  
11 evidence -- they didn't have any evidence that any of the  
12 opinions were, in fact, disbelieved by the speaker, and that's  
13 why they opted for this different formulation which is not  
14 consistent with wire fraud.

15                  JUDGE CABRANES: They say on TV. I have a final  
16 question of context before we recess. There was a reference  
17 earlier, and Mr. Pellettieri may wish to comment on this too,  
18 about a deferred prosecution of Rabobank?

19                  MR. SCHACHTER: Yes.

20                  JUDGE CABRANES: Can you give us the timeline and also  
21 just indicate what relevance, if any, it has to this.

22                  MR. SCHACHTER: The timeline was that Rabobank entered  
23 into a resolution with the government --

24                  JUDGE CABRANES: Did you represent them?

25                  MR. SCHACHTER: No. It's of no relevance. Look, the

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1 reality is --

2 JUDGE CABRANES: It antedated the indictments here.

3 MR. SCHACHTER: Absolutely correct, and financial  
4 institutions settle cases with the government for all sorts of  
5 reasons.

6 JUDGE CABRANES: I understand that. What was the  
7 role, if any, of Rabobank in cooperating with the government?  
8 Do we know that? Do we care about that?

9 MR. SCHACHTER: I don't think it is of any moment. I  
10 think they responded to the government's requests.

11 JUDGE CABRANES: Yes. OK.

12 Mr. Pellettieri, would you like to comment on that?

13 MR. PELLETTIERI: The deferred prosecution was in that  
14 time period, and it reserved the ability of the Department of  
15 Justice to go after individuals.

16 JUDGE CABRANES: Right. I think it would be helpful  
17 to the Court if counsel on both sides were to make arrangements  
18 with the clerk's office have a transcript of this splendid oral  
19 argument prepared for your use as well as ours.

20 We thank you very much. We will take this case under  
21 submission. You expected a summary order, I know, but absent a  
22 summary order, we will recess. We will adjourn for the day.

23 (Adjourned)

24

25